DOCKET

No. 88-681-CFX
Status: GRANTED

Title: California State Board of Equalization, Petitioner
v.
Sierra Summit, Inc.

Docketed:
October 20, 1988

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Tyler Jr.,Robert F.

Counsel for respondent: Lang Jr.,Frank H.

Entry	Date	Note	Proceedings and Orders
1	Oct 20 1988	G	Petition for writ of certiorari filed.
2	Nov 22 1988		DISTRIBUTED. December 9, 1988
3	Nov 22 1988	X	Brief of respondent Sierra Summit, Inc. in opposition filed.
4	Dec 12 1988		Petition GRANTED. Justice Brennan OUT.
			**********
5	Jan 4 1989		Record filed.
		*	Certified copy of C. A. proceedings recieved.
6	Jan 12 1989		Record filed.
		*	Certified copy of original record received.
7	Jan 26 1989		Joint appendix filed.
8	Jan 26 1989		Brief of petitioner CA State Board of Equalization filed.
9	Jan 26 1989	G	Motion of National Governors' Association, et al. for leave to file a brief as amici curiae filed.
10	Feb 21 1989		Motion of National Governors' Association, et al. for leave to file a brief as amici curiae GRANTED.
11	Feb 23 1989		Brief amicus curiae of Kenneth L. Spears, Trustee, etc. filed.
12	Mar 1 1989		Brief of respondent Sierra Summit, Inc. filed.
14	Mar 3 1989		Brief amici curiae of First National Bank of Boston, et al. filed.
13	Mar 8 1989		SET FOR ARGUMENT, APRIL 19, 1989. (2nd CASE)
15	Mar 15 1989		CIRCULATED.
16	Mar 31 1989	X	Reply brief of petitioner CA St. Bd. of Equalization filed.
17	Apr 19 1989		ARGUED.
18	Apr 20 1989		Record filed.
		*	Certified copy of briefs, 5, received.

PETITION FOR WRIT OF CERTIORARI

88-681

No. 88-

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

vs.

SIERRA SUMMIT, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN K. VAN DE KAMP
Attorney General of
the State of California
ROBERT F. TYLER*
Supervising Deputy
Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5155
**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F. CA 94103 • (415) 864-2300

83pp

QUESTIONS PRESENTED

1. Consistent with the Tenth Amendment, does property purchased at a bankruptcy liquidation sale enjoy an immunity from non-discriminatory state sales and use taxes, both at the time of transfer and while thereafter utilized in the purchaser's normal course of business?

2. Does a bankruptcy court have jurisdiction, the State Anti-Tax Injunction Act (Title 28 U.S.C. section 1341) notwithstanding, to enter an order barring the imposition of state taxes against a person who is neither a debtor nor court officer in any presently pending bankruptcy proceeding?

LIST OF PARTIES

The parties to the proceedings below were the petitioner California State Board of Equalization, respondent Sierra Summit Inc., and Richard T. Ford, the trustee of the bankruptcy debtor China Peak Resorts.

Richard T. Ford, Trustee, was a party to the adversary proceeding whose judgment forms the basis for the contempt citation at issue herein. Mr. Ford was not party to any of the contempt proceedings themselves, as none of his rights, duties, or obligations were thereby drawn into question, and is accordingly not named as a party herein.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case and the Facts	4
I	
Reasons for Granting the Writ	8
The Ninth Circuit's Goggin II doctrine (a) violates the general rule of taxability of bankruptcy property expressed in Title 28 U.S.C. § 960 and the sovereign taxing powers reserved to the States under the Tenth Amendement, and (b) conflicts with decisions of other circuits	8
II	
The Court of Appeals decision is based upon a court order which was both in excess of bankruptcy jurisdiction and violative of the "Anti-Tax Injunction Act"; given the lack of subject matter jurisdiction for same, the Board is not precluded from raising this error in the instant proceedings	14
Conclusion	17

TABLE OF AUTHORITIES CITED

Cases

	Page
Baker & Taylor Drilling Co. v. Stafford, 369 F.2d 552 (9th Cir. 1966)	15
Bland v. McHann, 463 F.2d 21 (5th Cir. 1972) *cert den.* 410 U.S. 966 (1973)	14
California v. Grace Brethren Church, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982)	14
California State Board of Equalization v. Goggin, 191 F.2d 726 (9th Cir., 1951)	10, 11
California State Board of Equalization v. Goggin 245 F.2d 44 (9th Cir., 1957)	*passim*
Debtor Reorganizers Inc. v. Board of Equalization 58 Cal.App.3d 691, 130 Cal.Rptr. 64 (1976)	7
Evarts v. Eloy Gin Corp., 204 F.2d 712 (9th Cir. 1953), *cert. den.* 346 U.S. 876, 74 S.Ct. 129, 98 LEd. 384 (1953)	15
Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955)	16
Graves v. New York ex rel O'Keefe, 306 U.S. 466, 59 S.CT. 595, 83 L.Ed. 927 (1939)	11, 13
In re Chicago, Rock Island and Pacific Railroad Co., 794 F.2d 1182, (7th Cir. 1986)	13
In re Cusato Brothers International Inc. 750 F.3d 887 (11th Cir. 1985), *cert. den.* 472 U.S. 1010, 105 S.Ct. 2707, 86 L.Ed.2d 722 (1985)	10
In re Hatfield Construction Co. 494 F.2d 1179 (5th Cir. 1974)	8, 9, 12
In re Hubs Repair Shop, Inc., 28 B.R.858 (Bky. N.D. Iowa 1983)	9
In re Leavy 85 F.2d 25 (2d Cir. 1936)	8, 9, 12
In re Loehr, 98 F.Supp. 402 (E.D. Wisc. 1950)	12
In re Mid America Co., 31 F.Supp. 601 (S.D.Ill. 1939)	12
In re Rhea, 17 B.R. 789 (Bky. W.D. Okl. 1982)	10
In re Samoset Associates, 14 B.R. 408 (Bky. Me. 1981)	10
In re Shirley Duke Associates, 611 F.2d 15 (2d Cir. 1979)	15
In re Sunrise Construction, 39 B.R. 668 (Bky. Wyo. 1984)	9
In re Warmings A.G. Food Center, 50 B.R. 748 (D.C.Me. 1985)	9, 10

TABLE OF AUTHORITIES CITED

CASE

	Page
In re Xonics, Inc., 813 F.2d 127 (7th Cir. 1987)	15
Magruder v. Washington, Baltimore & Annapolis Realty Corp., 316 U.S. 69, 62 S.Ct. 922, 86 L.Ed. 1278 (1942)	12
Palmer v. Webster & Atlas National Bank, 312 U.S. 156, 61 S.Ct. 542 85 L.Ed. 642 (1941), reh. den. 61 S.Ct. 728	11
Penn Dairies v. Milk Control Commission, 318 U.S. 261, 63 S.Ct. 617, 87 L.Ed. 748 (1943)	13
State of Missouri v. Gleick 135 F.2d 134 (8th Cir. 1943)	12
Swarts v. Hammer, 194 U.S. 441, 24 S.Ct. 695, 48 L.Ed. 1060 (1904)	11, 13
United States v. Sampsell, 266 F.2d 631 (9th Cir. 1959)	12
United States v. Thompson, 319 F.2d 665 (2d Cir. 1963)	17
United States v. United Mine Workers of America, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947)	16

Constitution

Amendment X	i, 3, 8

Statutes

11 U.S.C. Section 105	2, 3, 6, 14
28 U.S.C.:	
Section 157	2, 4, 15
Section 158(b)	2, 6
Section 158(d)	2, 7
Section 960	3, 8, 10
Section 1254(1)	2
Section 1341	i, 3, 6, 14

No. 88-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

VS.

SIERRA SUMMIT, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner California State Board of Equalization respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding (sub nom *In re China Peak Resort*) on May 25, 1988 (rehearing denied July 22, 1988).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (reported at 847 F.2d 570) appears in Appendix A. Its order denying rehearing appears in Appendix D. The opinion of the Bankruptcy Appellate Panel of the Ninth Circuit Court of Appeals (reported at 76 B.R. 757) appears in Appendix B. The opinion of the United States Bankruptcy Court for the Eastern District of California (unreported decision in case No. 180-01352) appears in Appendix C.

JURISDICTION

Invoking bankruptcy jurisdiction under Title 11 U.S.C. section 105 and Title 28 U.S.C. section 157, respondent Sierra Summit brought the instant suit by way of an "Order to Show Cause re Contempt" in the United States Bankruptcy Court for the Eastern District of California, alleging that petitioner California State Board of Equalization had violated that court's judgment entered in an adversary proceeding relative to the estate of debtor China Peak Resorts, Inc. (Bankruptcy Court, Eastern District of California, Adversary Proceeding #83-0344, *Richard T. Ford, on behalf of China Peak Resort, etc. v. California State Board of Equalization*). On May 6, 1986, the Bankruptcy Court denied the application and discharged its prior order, finding that petitioner's actions did not violate that prior adversary judgment, that it had no jurisdiction to hear the controversy, and that abstention from hearing same was proper in any event. See page 6, infra.

On respondent's appeal to the Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals (hereinafter "Bankruptcy Appellate Panel") pursuant to Title 28 U.S.C. section 158(b), the Bankruptcy Appellate Panel, with dissent, reversed the Bankruptcy Court, finding that it should have exercised jurisdiction over the controversy, declined abstention, and found against the Board. See pages 6-7, infra.

On petitioner's appeal to the United States Court of Appeals for the Ninth Circuit pursuant to Title 28 U.S.C. sections 158(d) and 1291, that court filed its decision on May 25, 1988, upholding the majority decision of the Bankruptcy Appellate Panel. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on July 22, 1988 (Appendix D). This Court's jurisdiction is invoked under Title 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment X to the Constitution provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Title 28 U.S.C. Section 1341, the State Anti-Tax Injunction Act provides that:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Title 28 U.S.C. Section 960 provides that:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State, and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

Section 105 of the Bankruptcy Code (Title 11 U.S.C.) provides in pertinent part that:

> "(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
>
> (b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.
>
> (c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy

judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation."

Title 28 U.S.C. section 157 appears in Appendix H.

Although the validity of the basis of the imposition of the use taxes in question is not in question herein, the California statutes and administrative regulation upon which those taxes were exacted appear in Appendix E.

STATEMENT OF THE CASE AND THE FACTS

On August 4, 1980, the debtor, China Peak Resort ("China Peak"), filed for relief under Chapter XI of the Bankruptcy Code (Title 11 U.S.C.). On December 16, 1981, the Bankruptcy Court approved the sale of various of China Peak's assets to Snow Summit Ski Corporation (hereinafter "Snow Summit"). Snow Summit, in turn, directed that those assets be delivered to its newly created, wholly owned subsidiary respondent Sierra Summit, Inc. ("Sierra Summit"). Following completion of this transfer, China Peak dismissed its Bankruptcy Petition on May 24, 1982.[1]

The California State Board of Equalization ("the Board") thereafter attempted to tax the bankruptcy estate for the sales taxes due upon the estate's transfer of these assets to Snow Summit. The bankruptcy trustee filed an adversary proceeding (U.S.B.C., E.D. Cal. Adv No. 183-0344) protesting this assessment, which was decided adversely to the Board on July 27, 1983 when the Bankruptcy Court found that the December 16, 1981

[1] This procedure is what is known under the Code as a "liquidating eleven", essentially an oxymoron, wherein a debtor liquidates its estate under a Plan of Reorganization, rather than a "straight" bankruptcy under Chapter VII. Liquid ing 11's were unknown under the predecessor to the Code, the Bankruptcy Act, but since the Code's promulgation in 1978, have become relatively common. Most obviously, given this, the question of whether a given entity is in liquidation is not now always apparent from the Chapter the proceedings are filed under, nor, given the newly created "debtors-in-possession", are such liquidations always conducted by trustees appointed by the bankruptcy court.

sale "essentially constituted" a liquidation of the entirety of the China Peak estate, and thereupon adjudged that any tax upon such a sale was prohibited under *California State Board of Equalization v. Goggin* 245 F.2d 44 (9th Cir., 1957) (hereinafter referred to as "Goggin II"). A copy of this judgment appears as Exhibit A to Appendix F. By its terms, this judgment prohibited the Board from "assess(ing) or enforc(ing) a sales or other tax against the (trustee), China Peak, its principals or other parties by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit . . . " Exhibit A to Appendix F.

After it received China Peak's equipment and physical plant under the 1981 sale, Sierra Summit began commercial operations, which as relevant herein, included renting the ski equipment it had received under the bankruptcy sale to its (Sierra Summit's) customers. In December of 1985, the Board rendered a field audit of Sierra Summit's business operations for the period November 10, 1982 through September 30, 1985, finding that Sierra Summit had understated its tax law liabilities for that period: a portion of this discrepancy was attributable to Sierra Summit's failure to declare and remit the use taxes which should have been collected from its customers on the rentals of the ski equipment it had purchased ex-tax from the bankruptcy estate. Exhibit B to Appendix F. In February of 1986, Sierra Summit demanded that the Board immediately refrain from any further pursuit of any portion of this audit,[2] stating that the taxes in question were barred by the Bankruptcy Court's Adversary Proceeding Judgment of July 23, 1983. Exhibit C to Appendix F. The Board responded that it did not believe that its actions violated

[2] The taxes arguably violating the Bankruptcy Court's prior order were only a portion of those determined by the audit which triggered these events. However, by operation of the instant proceedings, all collection activities on same have been placed in abeyance, including those not falling within Goggin II's proscription. While the Ninth Circuit stated in conclusion that it assumed that the bankruptcy court would hold the Board in contempt only for that portion of the audit arising from the use tax on the ski rentals, the point remains that any and all collection activities on this "unrelated" portion of the audit has been forestalled for three years.

that Judgment and stated that Sierra Summit, if dissatisfied, should pursue its remedies available under California law. Exhibit D to Appendix F.

On February 19, 1985, after reopening the underlying bankruptcy proceedings, Sierra Summit filed an Order to Show Cause re Contempt with the Bankruptcy Court alleging the above, and contending that the Board's assessment of these use taxes constituted a violation of the bankruptcy court's prior Adversary Judgment. This application appears in Appendix F.

The Board responded that: given the strictures of 28 U.S.C. section 1341, the Bankruptcy Court lacked jurisdiction of the matter; even if the Bankruptcy Court had jurisdiction, it should abstain from hearing the matter; and, should the matter be properly heard on its merits, that the Board's actions violated neither the prior judgment nor Goggin II. This Response appears in Appendix G.

The Bankruptcy Court issued its opinion on May 9, 1986, essentially adopting the Board's response. See Appendix C.

Sierra Summit appealed to the Bankruptcy Appellate Panel, pursuant to Title 28 U.S.C. section 158(b), where in a majority decision, the Bankruptcy Court's ruling was reversed. The reasoning of that majority was simple: since the only reason that Sierra Summit was not exempted from the use taxes in question was because no taxes had been paid on the transfer of the skis from the bankruptcy estate to Snow Summit, and since those taxes were barred by Goggin II, the taxes in question were "based in fact upon the (liquidation) sale" and were therefore likewise barred. Additionally, it was held that the provisions of Title 28 U.S.C. section 1341 (the Anti-Tax Injunction Act) did not divest the Bankruptcy Court of jurisdiction in that the Bankruptcy Court, under the general powers conferred upon it under Title 11 U.S.C. section 105, had to determine the Board's compliance with its prior judgment, and that the Bankruptcy Court should

likewise not have abstained from exercising that jurisdiction in that Sierra Summit had no available state remedy.[3]

A dissent was also filed, in which, while finding that the Bankruptcy Court erred both in declining jurisdiction and in finding abstention appropriate, it was argued that the imposition of use taxes on subsequent rentals of equipment purchased at a bankruptcy liquidation sale did not violate Goggin II in that the tax was not imposed against the parties in bankruptcy[4], it arose (and was measured) by events unrelated to the bankruptcy proceedings (i.e. the skiers' rental "use" of the skis), and thus that it did not arise "by reason of the (liquidation) sale" and imposed no burden on the liquidation processes of the bankruptcy court. Appendix B, Dissenting Opinion at pages 2-3.

The Board appealed the Bankruptcy Appellate Panel decision to the Ninth Circuit Court of Appeals, pursuant to Title 28 U.S.C. sections 158(d) and 1291. On May 25, 1988 the Ninth Circuit issued its unanimous decision affirming the majority decision of the Bankruptcy Appellate Panel, and remanded the matter back to the Bankruptcy Court with instructions to issue a contempt citation against the Board. The reasoning of the Circuit Court of Appeals generally followed that of the Bankruptcy Appellate Panel majority, with two salient exceptions. First, instead of discussing the merits of the jurisdictional argument, the Court of Appeals held that the Board had waived its ability to litigate same by failing to appeal the original adversary judgment. Second, the Court of Appeals addressed the Board's additional contention that Goggin II was incorrectly decided, as follows:

---

[3] California case law had already held that the Goggin II would not be expanded to the limits herein sought, i.e. to protect the purchaser at a liquidation sale from the duty to collect use taxes from its customers who thereafter rented or leased that same property. *Debtor Reorganizers, Inc. v. Board of Equalization* 58 Cal.App.3d 691, 130 Cal.Rptr. 64 (1976).

[4] In fact the primary incidence of the tax was not even imposed against Sierra Summit, but instead its rental customers. Under California law, Sierra Summit had the duty to collect these taxes from its customers and remit them to the Board.

> "The Board suggests that Goggin II was rongly decided. The Second and Fifth Circuits are in the Board's corner. See *In re Hatfield Construction Co.*, 494 F.2d 1179 (5th Cir 1974); *In re Leavy* 85 F.2d 25 (2d Cir 1936). But this circuit was aware of the Second circuit's reasoning and refused to follow it, and the Supreme Court, denying certiorari, accepted a certain regionalism in the administration of federal bankruptcy law in relation to state sales and use taxes. It is not within the power of this panel—and not within its heart—to change a rule of this circuit that has been in force for over thirty years."

This conclusion was reiterated when the Board's direct attempt to gain reconsideration of Goggin II through a request for rehearing en banc was denied by the Ninth Circuit on July 22, 1988. Appendix D.

I

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's Goggin II doctrine (a) violates the general rule of taxability of bankruptcy property expressed in Title 28 U.S.C. § 960 and the sovereign taxing powers reserved to the States under the Tenth Amendment, and (b) conflicts with decisions of other circuits

In its present opinion, the Ninth Circuit has finally reached the logical extension of the doctrine it first expressed in Goggin II, here frustrating the efforts of a state taxing agency to collect "use taxes" based upon a bankruptcy liquidation sale purchaser's subsequent rentals of the property acquired therein. While a logical extension of the Goggin II doctrine, the opinion is also the *reductio ad absurdum* thereof, for it divorces the application of the rule from any process of the bankruptcy court, construes the marginal "indirect" effect of the diminution of value of the bankruptcy estate occasioned by taxation thereof into a conflict with the Bankruptcy Code, Title 28 section 960 notwithstanding, and then resolves that perceived conflict against the sovereign taxing powers of the States despite the Tenth Amendment. While the opinion is clearly erroneous, it is also in irreconcilable conflict

with the decisional law of at least two other circuits, a conflict which the Ninth Circuit declares is merely indicative of a "certain federalism" this Court is purported to accord the various Circuits to allow them to treat the sovereign taxation powers of the States within their jurisdictions in differing manners. The opinion clearly calls for the exercise of this Court's power of supervision not only to correct the patent error contained therein, but also to harmonize the rules of the various Circuits on this definitionally important issue.

On one level, to be directly discussed in Argument II, infra, the decision clearly represents an insinuation of bankruptcy jurisdiction far beyond its logical bounds, to adjudicate disputes between parties unrelated to any pending bankruptcy case arising from commercial discourse unrelated to the administration of any bankruptcy estate. The perceived need for such interference is justified by the Court of Appeals, however, upon the purported interference that that taxation has upon the process of bankruptcy liquidations.

This perceived interference with the bankruptcy process is in turn, based upon Goggin II, which exists as one of two lines of authority concerning the general taxability of bankruptcy liquidation sales. In the Second and Fifth Circuits, while such sales are not directly taxable to the bankruptcy estate, the purchaser is recognized to be subject to any taxes applicable to his acquisition of the property from the estate, and the bankruptcy trustee is recognized to appropriately bear any duty of collection of those same taxes from him. *In re Hatfield*, supra, 494 F.2d at 1181; *In re Leavy*, supra; 85 F.2d at 27 see also Collier on Bankruptcy, volume 4A, at page 1145 (recognizing that trustee may be appropriately placed under duty to collect sales or use tax due from a purchaser at a bankruptcy liquidation sale).[5]

---

[5] This line of cases has also been followed in inferior courts of at least three other circuits, to wit: the First, Eighth, and Tenth. See e.g., *In re Warmings A.G. Food Center*, 50 B.R. 748 (D.C.Me. 1985); *In re Sunrise Construction*, 39 B.R. 668 (Bky. Wyo. 1984); *In re Hubs Repair Shop, Inc.*, 28 B.R. 858, 871 (Bky. N.D.Iowa 1983).

Conversely, in the Ninth Circuit the "absolutist"[6] view of Goggin II has been followed.[7] Under this rule, *any* effect that state taxation has upon the liquidation process creates an intolerable conflict with bankruptcy law that is absolutely forbidden. As applicable herein, given that the underlying bankruptcy proceedings were dismissed before the incidence of these taxes arose and that collection thereof rests upon respondent (rather than the bankruptcy debtor, trustee, or estate), that effect lies solely in a perceived diminution in the liquidation sale price arising through the fact that non-tax advantaged goods will be worth less to a prospective purchaser.[8]

Goggin II's absolutist approach permits no inquiry into the nature and effect of the burden thereby occasioned to the estate.[9]

---

[6] *In re Warmings A.G. Food Centers, Inc.*, supra, 50 B.R. at 752.

[7] Goggin II has arguably been followed by inferior courts in at least two Circuits, the First and Tenth. *In re Rhea*, 17 B.R. 789 (Bky. W.D. Okl. 1982); *In re Samoset Associates*, 14 B.R. 408 (Bky. Me. 1981). Additionally, it should be noted that the Eleventh Circuit, considering the question of the estate's, rather than purchaser's, direct tax liability for a liquidation sale, relied on Goggin II's rationale, discussed infra, that such a sale did not constitute "doing business" within the meaning of Title 28 U.S.C. § 960. *In re Cusato Brothers International, Inc.*, 750 F.2d 887 (11th Cir. 1985), cert. den. 472 U.S. 1010, 105 S.Ct. 2707, 86 L.Ed.2d 722 (1985).

[8] Under the facts of this case, the validity of this conclusion is seriously open to question, as Sierra Summit paid no initial taxes on its acquisition of the liquidated property, and even when taxed, only paid taxes on that portion it re-placed into the stream of commerce through rentals, and then only on a "pay-as-you-go" basis. Such obviously represents a very tangible commercial benefit which would not be available to it had it purchased these goods from an entity not liquidating in bankruptcy.

[9] This opinion is the logical outgrowth of the Goggin decisions. Goggin II, written by Judge Fee, itself was an outgrowth of a previous dispute regarding the same facts between the same parties, *California State Board of Equalization v. Goggin*, 191 F.2d 726 (9th Cir. 1951) (hereinafter "Goggin I"). Therein, Judge Fee wrote a concurring opinion in which he simply stated that "(a) tax on (a bankruptcy liquidation sale), whatever form it takes, is a tax on the processes of the Court . . . (and) is void." Goggin I, supra, 191 F.2d at 730. Of course this same perception permeates Goggin II, and is the "gloss" under which it is construed.

Compare, *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, 480, 59 S.Ct. 595, 83 L.Ed. 927 (1939) (when exemption from state taxation is claimed on the ground that the federal government has disclosed no intention with respect to the claimed immunity, the nature and effect of the alleged burden must be considered). As the application of that approach to the facts of this case demonstrates, Goggin II ultimately stands as contrary to the basic precept that Goggin II itself pays lip-service to, i.e. goods in the possession of bankruptcy officers are *not* "sacrosanct and thus immunized from state taxation". Goggin II, supra, at page 46.

This Court has held that the general rule applicable to the taxation of property in a bankruptcy estate is that all such property should be subject to taxation by the States and their subdivisions, absent a clear expression to the contrary from Congress. *Swarts v. Hammer*, 194 U.S. 441, 444, 24 S.Ct. 695, 48 L.Ed. 1060 (1904). This Court stated its reasons as follows:

> "(The property of the estate) is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."

Id., at 44, 24 S.Ct. at 703.

Were the above not enough, in 1940 Congress spoke in rather clear terms concerning a subset of this same question when it passed Title 28 U.S.C. section 960. Congress' manifest intent in same was to equalize the tax treatment of bankruptcy estates with that of entities operating outside of bankruptcy. *Palmer v. Webster & Atlas National Bank*, 312 U.S. 156, 163, 61 S.Ct. 542, 545, 85 L.Ed. 642 (1941), reh. den. 61 S.Ct. 728. This statute was

intended to prevent a bankruptcy receiver from gaining an advantage over competitors not in bankruptcy and to prevent state and local governments from being deprived of revenue. *Id.* It is, in short, an affirmation of tax liability. *United States v. Sampsell*, 266 F.2d 631, 635 (9th Cir. 1959).

In Goggin II, the Ninth Circuit created an exemption to section 960, by construing its language referring to taxes applicable to the "conduct( ) (of) any business" restrictively, to essentially mean only "sales in the normal course of business", and thereby construing the statute to *not* include sales undertaken in furtherance of liquidation activities. Goggin II, supra at 46 and 48. This construction is totally unwarranted and is, at best, an *ipse dixit*, for there is absolutely nothing in the statute suggesting that Congress meant in section 960 to differentiate between types of business activities: in fact, the statute specifically refers to the business activities subsumed therein in all-inclusive terms, to wit: "*any* business". This, and other terms of similar import have been consistently interpreted broadly as including liquidating activities. *Magruder v. Washington, Baltimore & Annapolis Realty Corp.*, 316 U.S. 69, 72-74, 62 S.Ct. 922, 86 L.Ed. 1278 (1942); *United States v. Sampsell*, supra 266 F.2d at 634. Thus, various courts, including the Ninth Circuit itself, have found that liquidating activities constitute "conducting business" within the meaning of § 960, and that applicable state and local taxes are appropriately levied thereon. *In re Hatfield*, supra, 494 F.2d at 1181; *United States v. Sampsell*, supra; *State of Missouri v. Gleick*, 135 F.2d 134, 137 (8th Cir. 1943); *In re Leavy*, supra, 85 F.2d at 27; *In re Loehr*, 98 F.Supp. 402, 403 (E.D. Wisc. 1950); *In re Mid America Co.*, 31 F.Supp. 601, 606 (S.D.Ill. 1939).

The validity of this conclusion is underscored when one considers the basis of the conflict between the bankruptcy system and state taxation which underlies the present facts, a diminution in the price fetched by the liquidation sale itself. Disregarding the fact that that totally utilitarian conclusion confuses the integrity of the bankruptcy process with a preferable result thereof, the point still remains that such is, at best an "indirect" or collateral effect thereon.

The effect of such an increased economic burden on governmental processes is one which the Constitution presupposes as arising as a normal incident of the organization within the same boundaries of two governments, each possessing the sovereign power to tax, and does not trigger an implied constitutional immunity of those federal functions from state taxation. *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 269-271, 63 S.Ct. 617, 87 L.Ed. 748 (1943); *Graves v. N.Y. ex rel O'Keefe*, supra 306 U.S. at 487. This conclusion adheres with special effect here, where a proposed immunity from state taxation is proposed on behalf of a private citizen, for same would operate to curtail the taxing power of the state without corresponding benefit to the government in whose name the immunity is claimed. *Graves v. N.Y. ex rel O'Keefe*, supra, 306 U.S. at 483. Similarly, the intention of Congress to proscribe such taxation in an area reserved to the federal government should neither be inferred nor implied where the Congressional intent to do so remains ambiguous, at best. *Penn Dairies v. Milk Control Commission*, supra, 318 U.S. at 275. In contravention of these rules, the Goggin II rule creates an immunity from state taxation on behalf of a private individual for the purpose of advantaging other private parties, i.e. the creditors of the estate, based upon a fanciful and strained reading of § 960 which is squarely contrary both to Congress' intent in enacting same and the plain language thereof.

The importance of the instant decision to the interests of the various states both in the Ninth Circuit and in any jurisdiction following Goggin II is exemplified by consideration of the demands the property whose taxation is at issue herein places upon the resources of those states. As applicable herein, such demands include, inter alia: construction and maintenance of the state and local roads utilized by respondent's customers to reach its facilities; state and local police protection; access to state courts to resolve disputes regarding or arising from that property's use; and, the provision of state and local health services to aid persons injured while using same. These are the same demands upon state services that this Court, in *Swarts v. Hammer*, supra, recognized as underlying the general rule of taxability of property in bankruptcy estates. These demands are the same considerations which

underlie the recognition of the states' sovereign rights contained in the Tenth Amendment.

Goggin II is incorrectly decided, irreconcilably conflicts with the decisional law of other circuits, and creates an unwarranted intrusion upon the ability of the states to exercise the sovereign powers of taxation reserved to them under the Tenth Amendment. It is necessary and appropriate that this Court exercise its supervisory powers to correct same.

II

The Court of Appeals decision is based upon a court order which was both in excess of bankruptcy jurisdiction and violative of the "Anti-Tax Injunction Act": given the lack of subject matter jurisdiction for same, the Board is not precluded from raising this error in the instant proceedings

Title 28 U.S.C. section 1341, otherwise known as the "Anti-Tax Injunction Act", is an express congressional limitation on the jurisdiction of the federal courts to entertain any case which seeks relief that would have the effect of enjoining or suspending the levy, assessment, or collection of any state tax. *California v. Grace Brethren Church*, 457 U.S. 393, 407 et seq., 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982); *Bland v. McHann*, 463 F.2d 21, 24-28 (5th Cir. 1972), cert. den. 410 U.S. 966 (1973). Obviously, the Order to Show Cause was meant to gain precisely the relief which is thereby proscribed. The Ninth Circuit, in its present opinion, hurdled this prohibition by merely stating that the bankruptcy court had the inherent jurisdiction under Title 11 U.S.C. section 105 to make such further orders as were necessary to effectuate its prior judgments and orders. Such an analysis is a tautological boot-strap which loses sight of the fact that bankruptcy jurisdiction over the instant dispute and the instant parties never exists in the first place: to the extent that the Bankruptcy Court's prior order ever intended to control the subsequent relationships between non-parties to the bankruptcy proceedings, after the property in question passed from the estate, that order clearly exceeded that court's jurisdiction.

Bankruptcy courts are courts of limited jurisdiction, whose powers must be expressed found in the Bankruptcy Code. *Baker & Taylor Drilling Co. v. Stafford*, 369 F.2d 552, 556 (9th Cir. 1966); *Evarts v. Eloy Gin Corp.*, 204 F.2d 712, 715 (9th Cir. 1953), cert. den. 346 U.S. 876, 74 S.Ct.129, 98 L.Ed. 384 (1953). Bankruptcy jurisdiction does not exist to adjudicate disputes between third parties, not involving the debtor or his property unless settlement of same is necessary to completely administer the bankrupt's estate. *In re Shirley Duke Associates*, 611 F.2d 15, 18 (2d Cir. 1979); *Evarts v. Eloy Gin Corp.*, supra, 204 F.2d at 717. These precepts are followed through the newly enacted post-Marathon Congressional grant of jurisdiction to the Bankruptcy Courts, Title 28 U.S.C. section 157. Under that section, the Congressional grant of bankruptcy jurisdiction is exactly circumscribed by the above parameters. Here, the dispute is between third parties, and the resolution of same is in no way necessary to complete the adjudication of the now long since dismissed bankruptcy estate.

The present opinion's conclusion that bankruptcy jurisdiction exists to determine the taxability of the property once in the purchaser's hands ultimately is founded upon the precept that, once a bankruptcy court obtains jurisdiction over a dispute of property contained in the debtor's estate, its jurisdiction continues even though that property thereafter leaves the estate. That precept is simply incorrect, for bankruptcy jurisdiction does not follow the property, but instead, as circumscribed by the outer limits of the estate itself, lapses either when the bankruptcy estate is closed or when that property leaves the estate. *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987); *In re Chicago, Rock Island and Pacific Railroad Co.*, 794 F.2d 1182, 1186-1188 (7th Cir. 1986). Once the property leaves the estate, there must exist a separate basis of federal jurisdiction independent of the original bankruptcy jurisdiction to adjudicate subsequent disputes between third parties as to their respective rights in same. *Id.* No such jurisdiction exists in this case.

Given this, the Board's attempt to tax respondent's customers' use of the skis raised no conflict with the inherent powers of the bankruptcy court to control its processes. The necessity to control

same ceased when China Peak dismissed its petition. Given this lack of conflict, there is no Supremacy analysis to engage in. Given the lack of bankruptcy jurisdiction, the Anti-Tax Injunction Act applies to divest the bankruptcy court of the jurisdiction over the controversy between petitioner and respondent it clearly never had.

In its present opinion, the Ninth Circuit chose to sidestep the issue of the jurisdictional propriety of the Bankruptcy Court's original order by merely stating that the Board, if it felt that same was erroneous, should have appealed therefrom and cannot now complain concerning any error in the entry of such an order against it. Such a ruling loses sight of the basic proposition that a party's inability to collaterally attack an order forming the basis of a contempt citation arises only where that order was issued by a court possessing not only personal, but subject matter jurisdiction over him. See *United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S.Ct. 677, 91 L.Ed. 884 (1947); compare *Fong Sik Leung v. Dulles*, 226 F.2d 74, 78-79 (9th Cir. 1955) (reading *United Mine Workers* requirements in the conjunctive).

Here, while the bankruptcy court obviously had personal jurisdiction over the Board in the Adversary Proceedings, it did not have subject matter jurisdiction to order the affairs of respondent and petitioner relative to events (i.e. respondent's subsequent rentals of the skis) taking place outside the bankruptcy both after the property passed from the bankruptcy estate and/or that estate was terminated, nor apparently did it intend to do so.[10] Conversely, to the extent that this order was meant by the bankruptcy court to have such an effect, it was, as shown above, outside that

[10] It is clear that the bankruptcy court did not actually intend to do so, in that by its original order denying the contempt citation, it not only held that the order was improperly read as reaching the limits urged by respondent, but that such an order was beyond its jurisdiction. Of course, instead of paying that court deference in its construction of what was intended by its own orders, both the Bankruptcy Appellate Panel and Ninth Circuit substituted their own opinions as to what should have been meant therein. Compare *In re Xonics*, supra at 130 (on review of a denial of a contempt citation, a court's construction of its own order should be entitled to respect).

court's limited grant of subject matter jurisdiction. Given this, the issue of the jurisdiction of that Court to enter such an order may be raised for the first time in the instant proceedings re contempt. *United States v. Thompson*, 319 F.2d 665, 668 (2d Cir. 1963).

The Court of Appeals' opinion would expand bankruptcy jurisdiction beyond its legal bounds, violating the Anti-Tax Injunction Act. The decision is not only clearly erroneous, but raises creates confusing and disturbing precedent concerning important questions regarding the proper jurisdictional limits of bankruptcy law, the interface of those limits with the jurisdictional prohibition of the Anti-Tax Injunction Act, and the necessity that state taxing agencies directly appeal all orders concerning the taxability of bankruptcy liquidation sales where there is any possibility that such issues might arise in the future. Plenary consideration of these issues by the Court is essential.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: October 17, 1988

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of
the State of California

ROBERT F. TYLER,
Supervising Deputy
Attorney General
Attorneys for Petitioner

(Appendices follow)

Appendix A

For Publication

United States Court of Appeals
for the Ninth Circuit

No. 87-2542

BAP No.
EC-86-1443-MoVJ

OPINION

In re: China Peak Resort,
Debtor,
California State Board of Equalization,
Appellant,

v.

Sierra Summit, Inc.,
Appellee.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel
Robert G. Mooreman, Sidney C. Volinn, and Robert C.
Jones, Bankruptcy Judges, Presiding

Argued and Submitted
March 17, 1988—San Francisco, California

Filed May 25, 1988

Before: Joseph T. Sneed, Cynthia Holcomb Hall and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

Counsel

Robert F. Tyler, Deputy Attorney General, Sacramento, California, for the appellant.

David Ray Jenkins, Fullerton, Lang, Richert & Patch, P.C., Fresno, California, for the appellee.

Opinion

NOONAN, Circuit Judge:

This case presents a challenge by the California State Baord of Equalization ("the Board") to the accepted rules of this circuit that California sales tax does not apply to the sale of assets of an estate in bankruptcy, *California State Board of Equalization v. Goggin,* 191 F.2d 726 (9th Cir. 1951), ("*Goggin* I"), *cert. denied,* 342 U.S. 909 (1952), and that California may not impose a use tax on the purchaser of such assets when the use tax operates only when the sales tax has not been paid. *California State Board of Equalization v. Goggin,* 245 F.2d 44 (9th Cir.) ("Goggin II"), *cert. denied,* 353 U.S. 961 (1957).

In 1981 the federal receiver of China Peak Resort contracted for the sale of its assets for $3,530,000 to Snow Summit Ski Corp. ("Snow Summit") and Snow Summit's wholly owned subsidiary, Sierra Summit Ski Corp. ("Sierra Summit"). The assets included all fixed improvements and all personal property; skis were among the stock in trade conveyed. A bill of sale issued from the receiver to Sierra Summit for the property.

The Board assessed a sales tax of $55,000 on the sale by the receiver. The bankruptcy court on July 27, 1983 enjoined collection of the assessment. The Board was also prohibited from assessing or determining "a sales or other tax" against the receiver "or other parties." Nothing daunted, the Board in 1985 audited Sierra Summit and determined that use tax was owned by Sierra Summit on income of $196,518 from rentals of the skis acquired from the receiver. Sierra Summit sought enforcement of the bankruptcy court's injunction in order to prevent the Board from assessing the tax but the bankruptcy court rejected this request, holding that it should abstain from exercising it; and that in any event its July 27, 1983 order did not bar the use tax. The Bankruptcy Appellate Panel reversed. From its judgment the Board appeals.

Analysis

Jurisdiction and Abstention From Its Exercise. The bankruptcy court has jurisdiction to issue orders necessary to carry out its functions, 11 U.S.C. § 105. The enjoining of state sales tax

upon a liquidation is such an order. *Goggin I.* Having issued the order, the bankruptcy court had jurisdiction to enforce it. Any objection the board might have made to the original order is too late. The order binds the Board, and the Board can only argue its interpretation.

By the same token, the bankruptcy court should not have abstained from exercising jurisdiction. That court had issued the order. It was incumbent on that court to interpret it. The Board relied on *Debtor Reorganizers, Inc. v. State Board of Equalization* 58 Cal. App. 3d 691, 130 Cal.Rptr. 64 (1976), for the proposition that a use tax of the kind it was assessing did not violate *Goggin II.* But the bankruptcy court, faced with this challenge to *Groggin II,* was bound to apply federal law, not the gloss of the state courts.

The Board argues that the bankruptcy court's refusal to exercise jurisdiction is non-reviewable because of 28 U.S.C. § 1334(c)(2). But the abstention was effected by the court under 28 U.S.C. § 1334(c)(1) and so reviewable. *See In re White Motor Credit,* 761 F.2d 270, 273-74 (6th Cir. 1985) (reviewing a discretionary decision to abstain under § 1334(4)(1)). We hold that it was not, as the statute requires, in the interest of justice, or in the interest of comity with state courts, or in the interest of respect for the state law, for the court to abstain from judging when it had already issued an injunction that no other court would be as well qualified to interpret.

Exemption From Taxation. Under California law rentals from tangible personal property are exempt from sales tax but subject to use tax. *Cal. Rev. & Tax. Code* §§ 6390 and 6401. To be subject to use tax, however, the rentals must constitute sales as defined in Section 6006. This statute excepts from its definition of sales a lease of tangible personal property as to which the lessor has paid either sales or use tax measured by the purchase price of the property. *Id.* § 6006(g)(5). Consequently if Sierra Summit had paid either sales or use tax on its purchase of skis from the receiver, its rentals from the skis would not be subject to use tax. Because no sales or use tax was paid on the purchase, the Board asserts a right to tax the rentals. Clearly its effort is one of "the protean forms" that Judge Fee in *Goggin II* declared the taxing

authorities might not assume in order to accomplish indirectly what they could not do directly. 245 F.2d at 46. The attempt is prohibited by *Goggin II* and the bankruptcy court's injunction.

The Board suggests that *Goggin II* was wrongly decided. The Second and Fifth Circuits are in the Board's corner. *See In re Hatfield Construction Co.*, 494 F.2d 1179 (5th Cir. 1974); *In re Leavy*, 85 F.2d 25 (2d Cir., 1936). But this circuit was aware of the Second Circuit's reasoning and refused to follow it, and the Supreme Court, denying certiorari, accepted a certain regionalism in the administration of federal bankruptcy law in relation to state sales and use taxes. It is not within the power of this panel—and not within its heart—to change a rule of this circuit that has been in force for over thirty years.

The Board argues that Sierra Summit is not being taxed on *its* use of the skis but on its discrete rentals to others. Nonetheless, there would be no tax if Sierra Summit had paid sales tax to the bankrupt estate: the use tax is a substitute for the tax the Board now admits it cannot collect under *Goggin I*. The Board points out that the use tax is not identical in amount with a sales tax on the purchase price. But, depending on the durability and fashionability of the skis, the use tax on rentals could exceed the sales tax. The Board argues that the skis will forever be insulated from tax. Not so. If Sierra Summit sells the skis to anyone else, a sales tax must be paid; there is no exemption for an outright sale. The Board argues half-heartedly—and appeared to abandon the contention in oral argument—that Snow Summit was the real purchaser. But the bill of sale was to Sierra Summit; it was a party protected by the bankruptcy court's decree.

We assume that on remand the bankruptcy court will hold the Board in contempt only as to its determination of use tax on the ski rentals.

AFFIRMED, and Remanded to the bankruptcy court for proceedings consistent with this opinion.

Appendix B

United States Bankruptcy Appellate Panel
of the Ninth Circuit

ORDERED PUBLISHED

BAP NO. EC 86-1443 MoVJ

Bankr. No. 180-01352

In re:

China Peak Resort, a limited partnership,
Debtor,

Sierra Summit, Inc.,
Appellant,

vs.

California State Board of Equalization,
Appellee.

OPINION

[Filed July 13, 1987]

Argued and Submitted on January 22, 1987
Sacramento, California
Filed: July 13, 1987

Appeal from the United States Bankruptcy Court
for the Eastern District of California
Hon. Eckhart A. Thompson, Bankruptcy Judge, Presiding

Before: MOOREMAN, VOLINN and JONES, Bankruptcy Judges

By this action, appellant challenges the imposition of a *use tax* by appellee California State Board of Equalization on the leasing of property purchased from the estate of the debtor. Appellant objects to the state's *use tax* on the grounds that a previous order of the trial court enjoined the state's attempt to impose a *sales tax* at the time appellant purchased equipment at a bankruptcy litigation sale.

The bankruptcy court declined the relief sought herein for several reasons; including the fact that the *use tax* sought to be imposed upon the appellant was separate and different from the *sales tax* previously enjoined; that the court lacked jurisdiction to hear the dispute, and that even if jurisdiction existed, the court would abstain from determination of the matter. Appellant timely appealed the order of the bankruptcy court. For the reasons set forth below, we reverse.

FACTS

The debtor herein, China Peak Resort, operated a ski resort. After financial difficulties, it filed a petition for relief under Chapter 11, 11 U.S.C., *et seq.* A state court receiver had already been appointed. Acting pursuant to authority of the bankruptcy court, the receiver engaged in negotiations for the sale of the assets of China Peak to the appellant. The purchase agreement was approved by the bankruptcy court. The California State Board of Equalization ("Board"), appellee herein, sought to impose a *sales tax* upon this conveyance. The receiver brought an adversary action challenging this tax, claiming the transaction to be exempt from taxation by the appellee. The bankruptcy court held the transaction exempt pursuant to 28 U.S.C. Section 960 and the Ninth Circuit holdings in *California State Board of Equalization v. Goggin,* ("Goggin I") 191 F.2d 726 (9th Cir. 1951), *cert. denied,* 342 U.S. 909; *California State Board of Equalization v. Goggin,* ("Goggin II") 245 F.2d 44 (9th Cir. 1957), *cert. denied,* 353 U.S. 961, on the basis that the sale was a liquidation of the bankruptcy estate.

Appellant Sierra Summit subsequently began operations of the ski resort, including the renting of ski equipment previously purchased from the estate. An audit of the business was conducted by the Board. Appellant was found to have understated its rental income, resulting in a tax liability. Sierra Summit contends that this income is exempt from taxation due to the prior order of the bankruptcy court. The prior ruling provided that:

> Defendant, California State Board of Equalization, its representatives, agents and employees are hereby perma-

> nently restrained and enjoined from commencing or continuing any act to impose, determine, assess or enforce a sales or other tax against the said Receiver, debtor, its principals or other parties by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation . . . .

The Board contends that the *use tax* which they are seeking to impose upon the appellant is not precluded by the exemption contained in the above order.

DISCUSSION

We must first determine whether this Court has jurisdiction over the matter presented herein. The trial court found that it had no jurisdiction based upon 28 U.S.C. Section 1341, which provides as follows:

> The district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Ninth Circuit has stated that this provision does not preclude an injunction consistent with the administration of a bankruptcy estate. *See Goggin I, supra,* at 728. As mentioned above, the trial court previously issued an injunction against the Board, precluding an imposition of a *sales tax* upon the liquidation sale of the items from the estate.

By this action, appellant asked the trial court to determine the application of its previous order to the facts presented herein and to make a determination of whether the Board acted in contempt of the previous injunction. Inherent in the court's jurisdiction, as defined by 28 U.S.C. Section 157, is the ability to determine the application of its previous orders. Therefore, based upon the request for review of its previous order, jurisdiction was proper for the limited purpose of determining compliance by the Board with the terms of the previous injunction.

Notwithstanding the above, the trail court found that if it did have jurisdiction, abstention was proper in the present case. Abstention is governed by 28 U.S.C. Section 1334(c). Pursuant

to 1334(c)(1), a court may abstain from determination of an issue in the interest of justice, the interest of comity with State courts or respect for State law.

The record herein does not support the trial court's decision to abstain. The relief sought was an interpretation of the court's previous order. Abstention would require another court or forum to determine the application of the injunction entered by the bankruptcy court. In addition, although there is a state system for reviewing the Board's assessment, a California state court decision[1] has indicated that it is not bound by the decisions of the Ninth Circuit in *Goggin I* and *Goggin II*. Under theses circumstances, abstention would preclude meaningful review of the appellant's claims.

In light of the above, the bankruptcy court abused its discretion in its decision to abstain from determination of the propriety of the *use tax* assessment by the Board.

As the trial court has jurisdiction and abstention is improper on these facts, the merits of the issue presented, i.e. the propriety of the imposition of a *use tax* upon equipment rented after a tax-free acquisition of the property from a bankruptcy estate liquidation, must be determined.

At oral argument, counsel for the Board indicated that the *use tax* assessment herein occurs only in a situation where items are used, or in this case rented, and a *sales tax* was not paid on the original purchase of the items. In addition, the dissent points out that this *use tax* is assessed against the party who leases/uses the property rather than upon the purchaser from the bankruptcy estate. *See* C.S.U.T.R. 1660(c)(1).

While 1660(c)(1) does impose this burden, 1660(c)(2) exempts all transactions from this tax where *sales tax* was paid upon the purchase of the equipment by the lessor. Therefore, the lessee/user liability for such a *use tax* arises *only* where *sales tax* was not paid upon the equipment at the time of purchase, e.g. a bankruptcy liquidation sale. Hence, the conduct of the purchaser

[1] *See Debtor Reorganizers, Inc. v. State Board of Equalization*, 58 C.A.3d 691, 130 Cal.Rptr. 64 (1976).

from the bankruptcy liquidation sale, i.e. whether *sales tax* is paid, is the exclusive factor which determines whether a *use tax* will be imposed. Subjecting all subsequent lease/use transactions to a *use tax* places a burden upon the purchaser of such equipment from the bankruptcy estate. This type of tax is expressly forbidden in the Ninth Circuit:

> Whatever the protean forms of a statute may be, or whatever subtle ingenuity of legislative tax advisors may suggest now or in the future, the tax is in fact based upon the sale; the sale is for the essential purpose of liquidating; the liquidation process was burdened thereby. The paramount authority in the bankruptcy field can be limited only by Congress. But, since Congress has already designated sales in the course of operation of a business as the sole area where the state may impose a tax of any type, [FTNT] 28 U.S.C. Section 960] essential sales in liquidation are inevitably free from such imposition.

Goggins II, 245 F.2d, at 46. This assessment of a *use tax* does not arise but for the failure of the purchaser to pay *sales tax* upon the liquidation sale from the bankruptcy estate. It is therefore based in fact upon the sale and is proscribed by the *Goggins* decisions.

In light of the injunction previously entered by the bankruptcy court and the holdings in the *Goggin* decisions, the Board improperly assessed a *use tax* upon the rentals of ski equipment that had been acquired by the appellant at a bankruptcy liquidation sale. Accordingly, the order of the trial court allowing the assessment is REVERSED. This matter is hereby REMANDED with instructions to the bankruptcy court to enter an order consistent with the above disposition.

Jones, J., dissenting

[Filed July 13, 1987]

Although I agree with the majority regarding the jurisdiction and abstention issues, I disagree that the bankruptcy court's order prohibits the state from collecting the tax at issue here. I therefore respectfully dissent.

The California Sales and Use Tax Regulations ("C.S.U.T.R." or "regulations") provide that, in general, a lease of tangible personal property is a "sale" and "purchase." C.S.U.T.R. 1660(b)(1). The regulations require payment of a use tax based upon the value of the rentals arising from such a transaction. C.S.U.T.R. 1660(c)(1). This tax, according to the regulations, is a tax upon the lessee's use of the property in California. *Id.* The lessor is required to collect the tax from the lessee but the lessee remains liable for the tax unless given a receipt evidencing collection by the lessor. C.S.U.T.R. 1660(c)(1). The regulations make an exception where the property is leased in substantially the same form as acquired and where sales tax the property has been paid upon initial purchase by lessor; the subsequent lease in such cases is not defined as a "sale" and "purchase". C.S.U.T.R. 1660(b)(1)(E). Accordingly, no sales or use tax is due. C.S.U.T.R. 1660(c)(2).

It is clear from this summary that the tax at issue here is based neither upon any transaction involving the trustee nor upon the use of the property by the party purchasing from the trustee ("purchaser"). Rather, the tax is based upon a separate transaction between the purchaser and a third party lessee; the tax is upon the *lessee's* use of the property. The trustee is not required to pay the tax or to collect it. Rather, the purchaser must collect the tax, but the regulations make clear that the lessee is the party liable for the tax unless the purchaser collects it. *See* C.S.U.T.R. 1660(c)(1).

The matter *sub judice* is, in my opinion, distinguishable from the *Goggin* cases. *California State Board of Equalization v. Goggin ("Goggin I")*, 191 F.2d 726 (9th Cir., 1951), *cert. denied*, 342 U.S. 909 (1952); *California State Board of Equalization v.*

Goggin ("Goggin II"), 245 F.2d 44 (9th Cir.), *cert. denied*, 353 U.S. 961 (1957). The *Goggin* cases stand for the proposition that a state may not, through its tax laws, impose a burden upon the essential liquidation process of the bankruptcy court.[1] As a result, a state may neither impose a sales tax upon the trustee when a sale is part of a court-ordered liquidation nor impose a use tax upon the party who purchases property at such a sale. *Goggin I*, 191 F.2d at 703; *Goggin II*, 245 F.2d at 45. The tax at issue here does not burden the essential liquidation process of the bankruptcy court and, in my opinion, is not assessed "by reason of the sale." The tax is assessed against the party leasing the property from the purchaser and is based upon that party's use of the property. The purchaser merely collects the tax and pays it to the state.

The majority relies upon the fact that the tax at issue is only assessed when no sales tax has been paid by the purchaser/lessor. This fact alone, however, does not make this tax one that is assessed "by reason of" the liquidation sale. The tax at issue here has no relationship to the sale of the property by the trustee: It is assessed against an unrelated third party; it is based upon that party's use of the property; and the amount of the tax assessed upon the amount of rent charged. In my opinion, therefore, the tax at issue is not assessed "by reason of" the liquidation sale and impses no burden upon the essential liquidation process of the bankruptcy court. Accordingly, I respectfully dissent.

---

[1] This is the holding of the *Goggin* cases. Notwithstanding the broad dicta from *Goggin II* cited by the majority, the relevant determination is whether the tax is imposed "by reason of" the liquidation sale. In this case, is is not.

Appendix C

In the United States Bankruptcy Court
Eastern District of California

Bky. No. 180-01352

In the Matter of China Peak Resort,
a limited partnership,
Debtor.

OPINION

[Filed May 9, 1986]

In December of 1981 the above debtor, China Peak Resort, sold certain ski equipment, etc., to Sierra Summit, Inc., hereinafter referred to as applicant. Thereafter, upon application of the debtor, China Peak Resort, this Court entered an order on July 27, 1983, which reads in part as follows,

> "Defendant, California State Board of Equalization, its representatives, agents and employees hereby are permanently restrained and enjoined from commencing or continuing any act to impose, determine, assess or enforce a sales or other tax against the said Receiver, debtor, its principals or other parties by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation pursuant to the Agreement of Purchase and Sale and Escrow Instructions dated December 3, 1981, approved by this court's 'Order Confirming Sale' filed December 16, 1981.

After purchasing said equipment from the debtor, rented it to various customers; thereupon respondent, Board of Equalization, sought to impose a use tax against applicant based upon applicant's gross receipts from said rentals. Applicant contends that the imposition of said tax on said rentals constitutes a violation of the restraining order contained in the said order or July 27, 1983. The Court disagrees. By restraining the imposition of a tax on the sale of the assets by the debtor, the Court did not restrain the imposition of a tax on the resale or rental of said assets by the purchaser.

The Court is further of the opinion that it does not have jurisdiction to grant the relief requested herein for the reasons set forth in said "response" and is of the opinion that if it had jurisdiction it should abstain from exercising jurisdiction.

It is therefore the opinion of the Court that the relief requested by applicant should be and is hereby denied.

Dated at Frenso, California this 9th day of May, 1986.

ECKHART A. THOMPSON

ECKHART A. THOMPSON, Judge
United States Bankruptcy Court

Appendix D

United States of Court of Appeals
for the Ninth Circuit

No. 87-2542
BAP# EC-86-1443-MoVJ

In re: China Peak Resort,
Debtor,
California State Board of Equalization,
Appellant,

v.

Sierra Summit, Inc.
Appellee.

ORDER
[Filed July 22, 1988]

Before: Sneed, Hall, and Noonan, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b)

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

Appendix E

Revenue & Taxation Code §§ 6006
6009
6010
6390
6401

California Sales & Use Tax Regulation (18 California Administrative Code § 1660)

§ 6006. Sale
"Sale" means and includes:

(a) Any transfer of title or posession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. "Transfer of possession," includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter.

(b) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

(c) The furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others.

(d) The furnishing, preparing, or serving for a consideration of food, meals, or drinks.

(e) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(f) A transfer for a consideration of the title or posession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication.

(g) Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:

(1) Motion picture, including television, films and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in transportation of persons or property as defined in Section 6023.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(B) A decedent from whom the lessor acquired the property by will or the laws of succession.

(6) A mobilehome, as defined in Sections 18008 and 18211 of the Health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980, and not subject to local property taxation.

(7) Paragraphs (1) and (5) and Section 6094.1 shall not apply to rentals or leases of videocassettes, videotapes, and videodiscs *for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the videocassette, videotape, or videodisc.*. (Added by Stats.1971, Ex.Sess., c.2, p. 5142, § 20, urgency, eff. Dec. 30, 1971, operative Jan. 1, 1972. Amended by Stats.1974, c. 709, p. 1581, § 1, urgency, eff. Sept. 6, 1974; Stats.1978, c. 1211, p. 3917, § 1.5; Stats.1980, c. 285, p. 585, § 7.1, imd. eff. June 30, 1980, operative July 1, 1980; Stats.1980, c. 1068, p. 3414, § 1, imd. eff. Sept. 26, 1980; Stats.1982, c. 1589, p. 6274, § 2; Stats.1983, c. 323, p. —, § 75.3, urgency, eff. July 21, 1983; Stats.1983, c. 1102, p —, § 18.2, urgency, eff. Sept. 27 1983.)

§ 6009. Use

"Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

(Added by Stats.1941, c. 36, p. 533, § 1. Amended by Stats.1965, 1st Ex.Sess., c. 2, p. 5445, § 5, eff. July 12, 1965, operative Aug. 1, 1965.)

§ 6009.1. Property for export; exclusion from "storage" or "use"

"Storage" and "use" do not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state. * * *

(Amended by Stats.1980, c. 546, p. 1503, § 1.)

§ 6010. Purchase

"Purchase" means and includes:

(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. "Transfer of possession," includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter.

(b) When performed outside this state or when the customer gives a resale certificate pursuant to Article 3 (commencing with Section 6091) of Chapter 2 of this part, the producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

(c) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(d) A transfer for a consideration of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication.

(e) Any lease of tangible personal property in any manner or by any means whatsoever, for consideration, except a lease of:

(1) Motion picture, including television, films and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in transportation of persons or property as defined in Section 6023.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(B) A decedent from whom the lessor acquired the property by will or the laws of succession.

(6) A mobilehome, as defined in Sections 18008 and 18211 of the Health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980, and not subject to local property taxation.

(7) Paragraphs(1) and (5) and Section 6094.1 shall not apply to rentals or leases of videocassettes, videotapes, and videodiscs *for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the*

videocassette, videotape, or videodisc. (Amended by Stats.1970, c. 1215, p. 2133, § 2; Stats.1971, c. 1777, p. 3833, § 2, imd. eff. Dec. 16, 1971, operative Jan. 1, 1972; Stats.1978, c. 1211, p. 3919, § 2; Stats.1980, c. 285, p. 586, § 7.2, imd. eff. June 30, 1980, operative July 1, 1980; Stats.1980, c. 1068, p. 3415, § 2, imd. eff. Sept. 26, 1980; Stats.1982, c. 1589, p. 6275, § 3; Stats.1983, c. 323, p. , § 75.5, urgency, eff. July 21 1983; Stats.1983, c. 1102, p. , § 18.3, urgency, eff. Sept. 27, 1983.)

§ 6390. Rentals payable under lease of tangible personal property when rentals required to be included in measure of use tax or when property situated outside state

There are exempted from the computation of the amount of the sales tax the rentals payable under a lease of tangible personal property (a) when such rentals are required to be included in the measure of the use tax or (b) when such property is situated outside this state.

(Added by Stats.1965, 1st Ex.Sess., c. 2, p. 5451, § 20, eff. July 12, 1965, operative Aug. 1, 1965.)

§ 6401. Property subject to sales tax

The storage, use, or other consumption in this state of property, the gross receipts from the sale of which * * * *the purchaser establishes to the satisfaction of the board were* included in the measure of the sales tax, is exempted from the use tax; provided, however, that this exemption does not extend to the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease.

(Amended by Stats.1978, c. 1211, p. 3924, § 13.)

Regulation 1660. LEASES OF TANGIBLE PERSONAL PROPERTY—IN GENERAL

(a) DEFINITION OF "LEASE". The term "lease" includes rental, hire, and license. It includes a contract under which a person secures for a consideration the temporary use of tangible personal property which, although not on his premises, is operated by, or under the direction and control of, the person or his employees. "Lease", however, does not include a use of tangible

personal property for a period of less than one day for a charge of less than twenty dollars ($20) when the privilege to use the property is restricted to use thereof on the premises or at a business location of the grantor of the privilege (see (e) below).

Where a contract designated as a lease binds the "lessee" for a fixed term and the "lessee" is to obtain title at the end of the term upon completion of the required payments or has the option to purchase the property for a nominal amount, the contract will be regarded as a sale under a security agreement from its inception and not as a lease. The option price will be regarded as nominal if it does not exceed $100 or 1 percent of the total contract price, whichever is the lesser amount.

(b) LEASES AS SALES OR PURCHASES.

(1) IN GENERAL. Any lease of tangible personal property in any manner whatsoever for a consideration is a "sale" as defined in Section 6006, and a "purchase" as defined in 6010, except a lease of:

(A) Motion picture files and video tapes, including television films and video tapes, whether or not they are productions complete in themselves. See, however, subdivision (d)(2) below for application of tax for periods on and after September 1, 1983, to leases of video cassettes, videotapes, and videodiscs for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the video cassette, videotape, or videodisc.

(B) Linen supplies and similar articles, including such items as towels, uniforms, coveralls, shop coats, dust cloths, caps and gowns, etc., when an essential part of the lease is the furnishing of the recurring service of laundering or cleaning of the articles leased.

(C) Household furnishings with a lease of the living quarters in which they are to be used. The lessor of the household furnishings must also be the lessor of the living quarters. The living quarters must be real property rather than tangible personal property.

(D) Mobile transportation equipment for use in transportation of persons or property (see Regulation 1661).

(E) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor as to which the lessor or his transferor acquired the property in a transaction that was a retail sale with respect to which the lessor or the transferor has paid sales tax reimbursement or as to which the lessor or the transferor has timely paid use tax measured by the purchase price of the property.

As used herein, "transferor" means:

1. A person from whom the lessor acquired the property in a transaction described in Section 6006.5(b), or

2. A decedent from whom the lessor acquired the property by will or by law of succession.

For purposes of 1. above, the transaction will qualify if the property is acquired in a transfer of all or substantially all of the tangible peronal property held or used by the transferor in all of his activities requiring the holding of a seller's permit or permits or in an activity or activities not requiring the holding of a seller's permit or permits, and the ownership of the tangible personal property is substantially similar after the transfer.

(F) A mobilehome, as defined in Sections 18008 and 18211 of the health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980 and not subject to local property taxation.

(2) LEASES AS CONTINUING SALES AND PURCHASES. In the case of any lease that is a "sale" and "purchase" under (1) above, the granting of possession by the lessor to the lessee, or to another person at the direction of the lessee, is a continuing sale in this state by the lessor, and the possession of the property by a lessee, or by another person at the direction of the lessee, is a continuing purchase for use in this state by the lessee, as respects any period of time the leased property is situated in this state, irrespective of the time or place

of delivery of the property to the lessee or such other persons. The application of tax to such leases is set forth below.

(c) GENERAL APPLICATION OF TAX.

(1) NATURE OF TAX. In the case of a lease that is a "sale" and "purchase" the tax is measured by the rentals payable. Generally, the applicable tax is a use tax upon the use in this state of the property by the lessee. The lessor must collect the tax from the lessee at the time rentals are paid by the lessee and give him a receipt of the kind called for in Regulation 1686. The lessee is not relieved from liability for the tax until he is given such a receipt or the tax is paid to the state.

When the lessee is not subject to use tax (for example, insurance companies), the sales tax applies. The sales tax is upon the lessor and is measured by the rentals payable.

Neither the sales tax nor the use tax applies to leases to the United States and its instrumentalities unless federal law permits taxing the instrumentality. For a more complete explanation regarding sales to the United States and its instrumentalities see Regulation 1614.

The "rentals" subject to the tax include any payments required by the lease, including amounts paid for personal property taxes on the leased property, whether assessed directly against the lessee or against the lessor, but do not include amounts paid to the lessor for:

(A) Collection costs, including attorney's fees, court costs, repossession charges, and storage fees; but tax does apply to any delinquent rental payments, including those collected by court action;

(B) Insuring, repairing or refurbishing the leased property following a default;

(C) Cost incurred in defending a court action or paying a tort judgment arising out of the lessee's operation of the leased property, or any premiums paid on insurance policies covering such court actions or tort judgments.

(D) Cost incurred in disposing of the leased property at expiration or earlier termination of the lease:

(E) Late charges and interest thereon for failing to pay the rentals timely;

(F) Separately stated optional [insurance charges,] maintenance or warranty contracts.

(2) PROPERTY LEASED IN FORM ACQUIRED. No sales or use tax is due with respect to the rentals charged for tangible personal property leased in substantially the same form as acquired by the lessor, or by his transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price. If such tax has not been so paid, and the lessor desires to pay tax measured by the purchase price, it must be reported and paid timely with the return of the lessor for the period during which the property is first placed in rental service. A timely return is a return filed within the time prescribed by Sections 6452 or 6455, whichever is applicable.

(3) PROPERTY PURCHASED TAX PAID. In the case of property ultimately leased in substantially the same form as acquired, payment of tax or tax reimbursement measured by the purchase price at the time the property is acquired constituted an irrevocable election not to pay tax measured by rental receipts. The lessor may not change his election by reporting tax on rental receipts and claiming a tax-paid-purchase-resold deduction.

(4) PROPERTY ACQUIRED IN EXEMPT TRANSACTIONS.

(A) A purchaser of tangible personal property acquired in a transaction defined as an occasional sale in Section 6006.5(a) and leased in substantially the same form as acquired by him, may elect to pay use tax measured by the purchase price of the property in lieu of tax measured by rental receipts.

(B) A purchaser of tangible personal property acquired in a transaction which qualifies under Section 6006.5(b) and leased in substantially the same form

Appendix F

David Ray Jenkins, #95310
Fullerton, Land, Richert & Patch, P.C.
Post Office Box 55555
Fresno, California 93747
(209) 252-3600
79201/mko

Attorneys for Sierra Summit, Inc.

In the United States Bankruptcy Court

Eastern District of California

No. 180-01352 Chapter 11

In the Matter of

China Peak Resort, a limited partnership,
Debtor.

Application for Order to Show Cause Re Contempt

[Filed February 19, 1985]

Sierra Summit, Inc. ("Sierra Summit") hereby applies for the entry, ex parte, of an order directing the State of California, State Board of Equalization, to appear before the above-entitled court on a date certain and show cause, if any exists, why it should not be held in contempt. This Application is based on the pleadings and records in the above-entitled Chapter 11 case and in adversary proceeding number 183-0344, upon such matters, if any, of which the court may properly take judicial notice, and upon the following:

1. On July 27, 1983 the above-entitled court entered a certain "Judgment", a true copy of which is annexed hereto, marked as Exhibit "A". Paragraph 3 of the Judgment provides, in pertinent part, as follows:

> "Defendant, California State Board of Equalization, its representatives, agents and employees hereby are permanently restrained and enjoined from commencing or continuing *any* act to impose, determine, assess or enforce a sales or *other* tax against the said Receiver, debtor, its principals or other

> *parties* by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation pursuant to the Agreement of Purchase and Sale and Escrow Instructions dated December 3, 1981, approved by this court's 'Order Confirming Sale' filed December 16, 1981." [emphasis added].

2. On, or about, December 19, 1985 State Board of Equalization completed a certain "Report of Field Audit", a true copy of which is annexed hereto, marked as Exhibit "B". Pursuant to said report State Board of Equalization purports to find a tax due and owing from Sierra Summit based on use of the certain equipment which was purchased from China Peak Resort, Ltd. under the December 31, 1981 agreement. The assessment of such a tax constitutes a violation and a contempt of the Judgment.

3. Before the reopening of the above-entitled Chapter 11 case and before the filing of this Application Sierra Summit's undersigned counsel caused to be sent to the State Board of Equalization a certain letter, a true copy of which is annexed hereto, marked as Exhibit "C". Said letter pointed out to the State Board of Equalization that its actions constituted a contempt of court and demanded that the State Board of Equalization cease and desist from its course of conduct.

4. By a letter dated February 11, 1986, a true copy of which is annexed hereto, marked as Exhibit "D", a representative of the State Board of Equalization has indicated that the State will not cease and desist from its contumacious conduct.

Dated: February 14, 1986.

FULLERTON, LANG, RICHERT
& PATCH, P.C.

BY DAVID RAY JENKINS
David Ray Jenkins, Attorneys for
Sierra Summit, Inc.

Order

To: The State of California, State Board of Equalization:

You are Hereby Ordered to designate a person or persons who shall appear before the above-entitled court on March 5, 1986 at 9:30 o'clock a.m. to show cause, if any exists, why you should not be held in contempt.

Dated: February 19, 1986.

ECKHART A. THOMPSON
United States Bankruptcy Judge

Exhibit A

Frank H. Lang, Jr., #032557
Fullerton, Lang, Richert & Patch, P.C.
Post Office Box 11926
Fresno, California 93775
(209) 486-3011

Attorneys for Plaintiff

In the United States Bankruptcy Court

Eastern District of California

No. 180-01352 Chapter 11

Adversary Proceeding No. 183-0344

In the Matter of

China Peak Resort, a limited partnership,

Debtor,

Richard T. Ford, on behalf of China Peak Resort, Ltd., and on his own behalf,

Plaintiff,

vs.

California State Board of Equalization,

Defendant.

Judgment

[Filed July 27, 1983]

Upon the Complaint of Plaintiff filed February 11, 1983 and Answer of Defendant, California State Board of Equalization, dated March 30, 1983; the Court having received written arguments of the parties relating both to Defendant's objection to jurisdiction and substantive issues of the case, and the facts having been communicated to the Court by written argument of the parties and appearing to be uncontroverted, and both parties having waived a factual hearing and upon said facts and docu-

ments submitted, and this Court having adopted its Findings of Facts and Conclusions of Law, now enters its judgment as follows:

It Is Ordered, Adjudged and Decreed that:

1. The sale of the assets of the debtor effected by the debtor-in-possession by and through Richard T. Ford, its Receiver, to Snow Summit Ski Corporation pursuant to the "Agreement of Purchase and Sale and Escrow Instructions" dated December 3, 1981, and approved by this Court in its "Order Confirming Sale" filed herein on December 16, 1981, is not subject to sales tax imposition by the State of California and the attempted assessment of sales tax against Richard T. Ford, as Receiver of the said debtor, and against said debtor and its principals, is illegal and void;

2. Neither Richard T. Ford, as Receiver of the debtor, nor the debtor, nor its principals (nor any person or entity indemnifying said persons), have or are subject to any liability to the California State Board of Equalization for sales or other tax by reason of the sale described hereinabove;

3. Defendant, California State Board of Equalization, its representatives, agents and employees hereby are permanently restrained and enjoined from commencing or continuing any act to impose, determine, assess or enforce a sales or other tax against the said Receiver, debtor, its principals or other parties by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation pursuant to the Agreement of Purchase and Sale and Escrow Instructions dated December 3, 1981, approved by this Court's "Order Confirming Sale" filed December 16, 1981.

Dated: July 27, 1983.

ECKHART A. THOMPSON
United States Bankruptcy Judge

[Exhibit B deleted due to unreadability]

Exhibit C

February 3, 1985

State Board of Equalization
Post Office Box 1799
Sacramento, California 35808

Re: Your Account No. SRDH23-742930
Our Client: Sierra Summit, Inc.
Our File No: 7920

Ladies and Gentlemen:

Enclosed for your information please find the following:

(1) Report of field audit dated 12/19/85; and

(2) A Judgment filed July 27, 1985.

The field audit report purports to find a tax due and owing based on the sale of the assets of China Peak Resort, Ltd. to my client. In that regard the field audit report constitutes a contempt of court. Reference is hereby made to paragraph 3 of the Judgment which provides as follows:

> "Defendent, California State Board of Equalization, its representatives, agents and employees hereby are permanently restrained and enjoined from commencing or continuing *any act* to impose, determine, assess or enforce a sales or *other tax* against the said receiver, debtor, its principals or *other parties* by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation pursuant to the agreement of purchase. . . ."

Unless you immediately cease and desist from your present course of conduct and acknowledge, in writing, that you will not hereafter pursue said course of conduct, my client has requested that I move to reopen the China Peak Resort Chapter 11 case and apply for an order to show cause why you should not be held in contempt. If such becomes necessary it will probably cost my client no less than $2,000.00. I believe it likely that Judge

Thompson would award a judgment against you in an amount equal, at least, to my client's actual costs incurred in pursuing this matter. Although my client has already incurred substantial accountants, attorneys, and personal expenses by reason of your contumacious conduct I believe my client would be inclined not to pursue damages if you will agree to cease, desist, and refrain from your course of conduct.

If I do not hear from you within ten (10) days after the date of this letter I will commence the course of action outlined above. Likewise, if during the next ten (10) days any steps are taken to enforce the purported tax liability stated in the enclosed field audit report I will immediately commence on the course of conduct outlined above.

Very truly yours,

Fullerton, Lang, Richert & Patch

David Ray Jenkins

DRJ/axc
Enclosures

cc: State Board of Equalization—
Fresno Office (w/enclosures)
Derry Knight, Esq., Deputy Attorney
General (w/enclosures)
Robert P. Pratte, Esq.

Exhibit D

State Board of Equalization

[LETTERHEAD]

February 11, 1986

Fullerton, Lang, Richert & Patch
Attorneys At Law
P.O. Box 55555
Fresno, Ca 93747-5555

Attention: David R. Jenkins

In reply refer to
Account No. SR DH 23-742930
Sierra Summit, Inc.
Your file No. 7920

Dear Mr. Jenkins:

This letter is in reply to your letter dated February 3, 1986. We cannot comply with your request to relieve the lessor of its liability incurred by its subsequent taxable use of assets purchased through the bankruptcy court.

We do not believe a court of competent jurisdiction will find us in contempt of court and cite as our authority 58 Cal App 3rd 691. We do not take exception here to the purchase of assets from the bankruptcy estate being exempt from both sales and use tax. Out assessment is for the subsequent taxable use of leasing the assets so purchased.

If you wish to pursue this matter further, I suggest you direct your client to utilize our petition/refund process as a forum to challenge the specifics of the audit.

Very truly yours,

R. A. Slater
Supervisor of Collections

By
Albert F. Deets
Business Taxes Compliance
Specialist

AFD:mkm
cc: Derry L. Knight
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, CA 95814

Appendix G

John K. Van De Kamp, Attorney General
of the State of California
Edward P. Hollingshead
Supervising Deputy Attorney General
Derry L. Knight #48121
Deputy Attorney General
1515 K Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5155

Attorneys for California
State Board of Equalization

United States Bankruptcy Court

Eastern District of California

No. 180-01352 Chapter 11

Response by State Board of Equalization
To Order to Show Cause Re Civil Contempt

Date: March 5, 1986
Time: 9:30 a.m.
Dept. Hon. E. A. Thompson

In the Matter of

China Peak Resort, a limited partnership,
Debtor.

INTRODUCTION

The State of California, State Board of Equalization (hereinafter "Board"), hereby responds to the court's order entered February 19, 1986, directing it to show cause why it should not be held in contempt. The show cause order was issued based on the application of Sierra Summit, Inc. ("Sierra Summit"), the purchaser of certain assets from China Peak Resort (hereinafter "debtor"), a debtor formerly before this Court. Sierra Summit, the purchaser, erroneously attempts to insulate itself from its sales and use tax obligation by making reference to a prior dispute between the Board and debtor China Peak Resort.

As more fully detailed below, the prior matter before this Court in no way resolved, or even dealt with, the impact upon the purchaser of its taxable use of the property purchased. Sierra Summit's remedy is to proceed, as it has already initiated, through the state administrative procedures, and then by a state court suit for refund should that be necessary. The federal courts, including the bankruptcy court, are wholly without jurisdiction to decide the propriety of a tax assessment against a nondebtor such as Sierra Summit.

I

THIS COURT'S PRIOR DECISION HAD NO BEARING UPON THE TAX OBLIGATIONS OF THE PURCHASER OF DEBTOR'S PROPERTY

Sierra Summit asserts that this Court's July 27, 1983 "Judgment" (Exh. "A" to application filed February 19, 1986) bars the imposition of taxes upon the purchaser as a result of taxable uses made of certain of the property purchased from debtor. Sierra Summit, through selective emphasis, attempts to suggest that this Court previously prohibited tax upon the purchaser's taxable uses of the property. Such an erroneous reading of the Judgment can only flow from the failure to note that the Judgment merely prohibited the imposition of a tax "by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation . . . . (¶ 3 of Judgment). Sierra Summit emphasizes the fact that the Judgment made reference to prohibiting the tax against the receiver or other parties, but attempts to ignore the fact that the entire dispute was over the taxability of the *sale* of the assets *by China Peak* Resort. The prior Judgment clearly was not directed at prohibiting any subsequent tax on the buyer as a result of its possible resale, or as here, rental of the equipment, where such transactions are otherwise subject to tax.

The Court's July 27, 1983 Judgment is, in the Board's view, clear in its inapplicability to subsequent taxable uses by the buyer. However, any possible ambiguity is eliminated by a reference to the findings of fact and the complaint which framed the issues of the prior dispute.

The findings of fact, which presumably were also signed by the court on July 27, 1983, refer at paragraph 10 to the assessment of sales tax which was then in dispute. The findings make it clear that the concern was with the imposition of a tax upon the principals of debtor and Richard T. Ford, as receiver, and were in no way a determination that sales or uses of the property would no longer ever be subject to a sales tax by the purchaser or subsequent purchasers. Paragraph 10 of the findings of fact thus state that

> "On or about January 13, 1983 Defendant California State Board of Equalization assessed or determined a sales tax of approximately $55,000.00 in the names of the principals of the debtor and Richard T. Ford as Receiver alleged to be *due by reason of the sale* of all of the assets of the said debtor *to Snow Summit Ski Corporation. . . .* " (Emphasis supplied.)

This Court then issued its conclusions of law to the effect that the subject sale was a "liquidation" sale, which had the effect of insulating *that sale* from imposition of the sales or use tax. This conclusion was reached based on the Ninth Circuit Court of Appeals *Goggin* decisions. (Findings and conclusions, pp. 7-8.)

The limited nature of the prior dispute is further revealed by a review of the Complaint for Determination of Administrative Tax Liability . . . , which pleading ultimately led to entry of the July 27, 1983 Judgment. The Complaint, filed February 11, 1983, thus sets forth at paragraph 6, virtually verbatim, the nature of the dispute as quoted above from the Findings of Fact. The Complaint then, at paragraph 8, further emphasizes this point by asserting that "The debtor's estate and Receiver have no liability for a California Sales Use Tax [sic] *in connection with the said described sale . . . .* " (Emphasis supplied.)

The review of the Judgment, Findings, and Complaint in the matter previously before this court thus established beyond question that subsequent taxable uses by the buyer, Sierra Summit, were in no way either considered or even tangentially before the court. This Court, therefore, has no jurisdiction nor authority to insulate the subject nondebtor from the state's otherwise applicable taxes.

II

THE PRESENT PROPOSED ASSESSMENT AGAINST PURCHASER SIERRA SUMMIT IS PROPER, IS PRESENTLY UNDER REVIEW AT ADMINISTRATIVE LEVEL, AND IS BEYOND THIS COURT'S JURISDICTION TO RESOLVE

A. The Tax Proposed on the Rental Receipts Is the Primary Tax, and Is Properly Imposed Against Sierra Summit

Sierra Summit objects to the Board-proposed assessment to the extent it imposes a use tax measured by gross receipts from its rentals of various ski equipment. Some of the rental ski equipment was apparently purchased from debtor China Peak. The California courts of appeal have repeatedly held that the tax payable upon rentals of specified property "is not imposed in lieu of any other tax. It is payable because a lease, like an outright sale, creates a new use that is equated with that incident to a new ownership." (*Debtor Reorganizers, Inc. v. State Bd. of Equalization* (1976) 58 Cal.App.3d 691, 698.) Other decisions expanding upon the nature of this separate taxable event are *Action Trailer Sales, Inc. v. State Board of Equalization* (1975) 54 Cal.App.3d 125, and *Ladd v. State Bd. of Equalization* (1973) 31 Cal.App.3d 35, 38 et seq.

Debtor Reorganizers involves a fact situation identical to that presented in the instant proceeding. As in this case, plaintiff Debtor Reorganizers attempted to insulate itself from responsibility for the use tax based on rental receipts on equipment which it had purchased from a trustee in bankruptcy. Debtor Reorganizers was unsuccessful, since the taxable event is the subsequent *use* of the property and not the sale by the debtor. A copy of the *Debtor Reorganizers* decision is attached for the ready reference of the court.

In short, the tax in issue is a tax based upon a subsequent use by the pruchaser, and is not a tax in any way tied to the previous sale by the trustee in bankruptcy. The subject tax, much like the sales tax upon any resale by Sierra Summit, is properly imposed by the Board.

B. Taxpayer Sierra Summit Is Presently Pursuing Its Available Remedies for a Review of the Subject Assessment

Taxpayer Sierra Summit has available to it a wholly adequate state remedy to contest the application of the sales tax. Indeed, Sierra Summit has already petitioned for redetermination of the subject tax, as evidenced by the attached 2/17/86 letter to the State Board of Equalization. The state administrative process, and available judicial review, provide the taxpayer with a wholly adequate remedy.

III

GIVEN THE INAPPLICABILITY OF THE PRIOR JUDGMENT OF THIS COURT, THE COURT LACKS JURISDICTION TO DETERMINE THE NON-DEBTOR'S TAX LIABILITY

A. Tax Injunction Act Deprives Federal Court of Jurisdiction

The existence of a state refund action, such as provided by the California Sales and Use Tax Law, invokes the restraints of the "Tax Injunction Act," which deprives the federal courts of jurisdiction. (*Kelly v. Springett* (9th Cir. 1975) 527 F.2d 1090, 1093-1094; *Bland v. McHann* (5th Cir. 1972) 463 F.2d 21, cert. den. (1973), 410 U.S. 966.)

This historic rule, which prevents the federal courts from interferring with the internal fiscal operations of the states, has been codified in 28 United States Code section 1341:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

It is well established that 28 United States Code section 1341 is an explicit congressional limitation on the jurisdiction of the federal courts in cases which would enjoin or suspend state tax levy, assessment. or collection. (*California v. Graced Brethren* (1982) 457 U.S. 393, 407 et seq.; *Randall v Franchise Tax Board of the State of California* (9th Cir. 1971) 453 F.2d 381; *Dillon v. State of Mont.* (9th Cir. 1980) 634 F.2d 463, 466 et seq.)

In this case, non-debtor Sierra Summit's proper plain, speedy and efficient remedy is to continue to pursue its administrative petition for redetermination and, if necessary, to pursue a suit for refund in the California courts. (See, Cal. Rev. & Tax. Code § 6931 et seq.) It is the duty of the federal courts to defer to such state administrative and judicial remedies when available for a taxpayer's redress. (*Kelly v. Springett, supra*, 527 F.2d at pp. 1093-1094; *Bland v. McHann, supra*, 463 F.2d 21, cert. den. 410 U.S. 966; *Grace Brethren, supra*, 457 U.S. at pp. 407-417.)

B. Federal Courts Should Abstain from Accepting Jurisdiction

In any event, the federal court should abstain from accepting jurisdiction under the principle of federal equitable jurisdiction which restrains the federal court from interference with the internal fiscal operations of the states. (*Great Lakes Dredge & Dock Co. v. Huffman* (1943) 319 U.S. 293.)

CONCLUSION

As further detailed above, this Court's prior Judgment in no way involved, much less resolved, the applicability of the California sales and use tax to *uses made by a purchaser* of property previously purchased from a debtor's estate. Given the absence of a connection between the prior Judgment and the present proceeding, the matter of the non-debtor Sierra Summit's tax liability is properly left to the wholly adequate and available state administrative and judicial remedies, which remedies taxpayer has already initiated. The federal courts lack jurisdiction to deal with such matters.

Accordingly, it is respectfully requested that the court issue an order dissolving the Order to show cause previously issued herein on February 19, 1986.

DATED: March 1, 1986

Respectfully submitted,

John K. Van De Kamp
Attorney General
Edward P. Hollingshead
Supervising Deputy
Attorney General

Derry L. Knight
Deputy Attorney General

Attorneys for California
State Board of Equalization

Opinion (*Mueller v. MacBan*) on pages 667-690 omitted.
Rehearing Granted*

[Civ. No. 46855, Second Dist., Div. Three, May 26, 1976.]

DEBTOR REORGANIZERS, INC., Plaintiff and Appellant,
v.
STATE BOARD OF EQUALIZATION, Defendant and Respondent.

Summary

The trial court entered summary judgment for defendant State Board of Equalization in an action to recover use taxes paid by plaintiff's assignor. The taxes in question were paid by the taxpayer while engaged in the business of selling and leasing property purchased from a trustee in bankruptcy liquidating a bankrupt estate following delinquency determinations by defendant board which required payment of the use tax on rental receipts derived from plaintiff's leases of livestock and equipment purchased from the trustee. (Superior Court of Los Angeles County, No. C 56004, Thomas Wilfred LeSage, Judge.)

The Court of Appeal affirmed, holding that a use tax on rental receipts derived from leases of livestock and equipment purchased from a trustee in bankruptcy did not constitute an unlawful interference with the process of the bankruptcy court. (Opinion by Potter, J., with Ford, P. J., and Allport, J., concurring.)

Headnotes

Classidied to California Digest of Official Reports, 3d Series

(1a, 1b) Sales and Use Taxes § 21—Transactions Subject to Use Tax—Rental Receipts on Property Purchased From Trustee in Bankruptcy.—A use tax derived from leases of livestock and equipment purchased by the lessor from a trustee in bankruptcy did not constitute and unlawful interference with the process of the bankruptcy court where the tax, imposed on the purchaser of the property, imposed no burden whatever on the bankruptcy

* See 62 Cal.App.3d 258 for subsequent opinion.

trustee in POTTER, J.—Plaintiff Debtor Reorganizers, Inc. appeals from a summary judgment in favor of defendant in plaintiff's action to recover use taxes in the sum of $27,905.60 paid by plaintiff's assignor Fat Jones Stables, Inc. (hereinafter referred to as "Stables"), in respect of which a claim for refund was made by Stables and denied by defendant board. The taxes in question were for the period January 1, 1966 through October 12, 1969, during which period Stables was engaged in the business of selling and leasing equipment and livestock which has been purchased from a trustee in bankruptcy in the course of liquidation of a bankrupt estate pursuant to an order of the United States District Court.

Stables collected and remitted sales taxes on all outright sales of such livestock and equipment each quarter as the sales were made. It did not pay sales or use taxes in respect of the rental receipts of livestock and equipment leased by it. Defendant board served a notice of determination requiring payment of "use tax applied to rental receipts derived from petitioner's leases of livestock and equipment purchased from the trustee in bankruptcy . . . . " Payment was made by Stables in accordance with the notice of redetermination and a claim for refund was filed.

Both plaintiff and defendant moved for summary judgment. There was no dispute as to the facts and the trial court concluded therefrom that use tax was payable based upon such rental receipts.

Contentions

Plaintiff contends that the sale of the livestock and equipment to Stables by the bankruptcy trustee, and the use by Stables of such property were not subject to sales or use tax because the imposition of a tax would be an unauthorized burden on the process of liquidation and that the use tax collected "is only imposed in lieu of the tax" which "the State is prohibited from collecting."

Defendant board contends that the claimed exemption of the sale by the trustee to Stables and of Stables' use is of questionable

validity and that in any event the tax upon the rental receipts is not a tax in lieu of such sales or use tax.

Discussion

(1a) We conclude that the application of the use tax found proper in the trial court does not constitute an unlawful interference with the process of the bankruptcy court, and we therefore affirm.

Plaintiff's claim that both the original liquidation sale from the trustee to Stables and Stables' subsequent use of the property purchased are exempt from taxation is based upon the decisions of the United States Court of Appeals for the Ninth Circuit in *California State Board of Equalization v. Goggin* (9th Cir. 1951) 191 F.2d 726 [27 A.L.R.2d 1211] [*Goggin I*] cert. den., 342 U.S. 909 [96 L.Ed.2d 680, 72 S.Ct 302], and *California State Board of Equalization v. Goggin* (9th Cir. 1957) 245 F.2d 44 [*Goggin II*] cert. den., 353 U.S. 961 [1 L.Ed.2d 910, 77 S.Ct. 863]. In *Goggin I*, the Ninth Circuit held the district court acted properly in affirming a referee's order enjoining the board from enforcing a claim of sales tax liability based upon liquidation sales made by the trustee in bankruptcy. The sales were made by the trustee without adding sales tax to the purchase price and the board made an additional determination of taxes for which demand for payment was made. The court stated the issue as follows: "The question remains whether or not the California sales tax applies to liquidation sales of personal property made by a trustee in bankruptcy pursuant to court order." (191 F.2d at p. 729).

The California Sales Tax Law was construed by the court as applying only to a seller who is "*conducting a retail business.* " (*Id.*) The court said: " '[T]he sale was not made in the course of conducting a business but in the process of putting an end to a business.' " (*Id.*) Such interpretation of the California statute was found to make it consistent with the federal statute "making officers appointed by United States courts liable for state taxes if they 'conduct any business.' [Fn. omitted.]" (191 F.2d at p. 730.) Judge Fee, then a district judge, concurred but upon the basis that the state had no power to thus tax the process of liquidation.

Judge Fee said in this respect (*Id.*): "A tax on this transaction, whatever form it takes, is a tax on the process of the Court liquidating assets in accordance with constitutional power. In another aspect, it may be considered as a license fee required of a federal officer to make liquidation. In either event, it is void. A tax may be levied upon specific property in the hands of a trustee in bankruptcy. [Citation.] But no state is empowered to levy taxes upon the process of the courts of the United States or to impede the officers of court in an essential judicial function. [Citation.] The District Court held as a fact that the transaction was in the nature of liquidation and was not a state tax upon the business of constructing the selling cabinets conducted by the trustee, who was authorized thereto by the United States Court. [Citation.] This finding of fact is binding unless clearly erroneous. [Citation.] Under such conditions, neither enactments of the State of California nor decisions of state courts nor practices of state administrative bodies can burden or impede administration of acts relating to bankruptcies. [Citation.]"

In *Goggin II*, Judge Fee, as a regular member of the court, authored the opinion. The board had again attempted to tax a liquidation sale of bankruptcy assets, seeking to avoid the effect of the first decision by calling it a use tax upon the purchaser which the trustee was required to collect.

This distinction was held irrelevant. Reference was again made to the federal statute "permitting officers of the bankruptcy court to pay taxes to the state for acts done in the conduct of the business" (245 F.2d at p. 45) as excluding taxability of acts done in liquidation, and the court said (*id.*): "In practice, if the sales tax were levied upon the Trustee, he would necessarily have passed the tax on to the purchaser. The same result is attained by taxing the purchaser and requiring the Trustee to collect or collecting the impost from the purchaser. All these devices are proscribed as to liquidating sales in bankruptcy. [Fns. omitted.]"

A contrary conclusion has been reached by the United States Court of Appeals for the Fifth Circuit in a more recent case, *In re Hatfield Construction Company* (5th Cir. 1974) 494 F.2d 1179. In that case, the Commissioner of Revenue of the State of Georgia was held entitled to require payment of sales tax upon

liquidation sales made by a trustee in bankruptcy. The court observed that "the liability for sales tax under the Georgia Act is imposed primarily on the purchaser with secondary liability on the seller to collect and remit the tax." (494 F.2d at p. 1180.) The situation was, therefore, indistinguishable from that presented in the *Goggin* II decision. Referring to the federal statute cited in the *Goggin* decisions, the court said (494 F.2d at p. 1181): "We do not read this statute as precluding or limiting the state taxing process in the circumstances obtaining here. Indeed, it has been long settled that property in the hands of a trustee in bankruptcy is not thereby exempt from state and local taxes, absent a clear expression from Congress to the contrary. Swarts v. Hammer, 1904, 194 U.S. 441, 24 S.Ct 695, 48 L.Ed. 1060. Section 960 is not such a clear expression, at least where the tax on the liquidating function is imposed on the purchaser in liquidation. This was the view of the Second Circuit in *Leavy, supra*, and it is a view tangentially supported by Missouri v. Gleick, 8th Cir., 1943, 135 F.2d 134, where a liquidation trustee was held liable for Missouri unemployment tax. *See also* In re Mid America Co., S.D.Ill., 1939, 31 F.Supp. 601, 606. In re Loehr, E.D.Wis., 1950, 98 F.Supp. 402; Note, State Taxation of Bankruptcy Liquidation: Federalism Misconceived, 67 Yale L.J. 335 (1957); Wurzel, Taxation During Bankruptcy Liquidation. 55 Harv.L.Rev. 1141, 1166 (1942). *Contra:* 4A Collier on Bankruptcy, ¶ 70.97 [4]; Paskay, Handbook for Trustees and Receivers in Bankruptcy, § 14.005; Note, Bankruptcy Sale as a Judicial Sale Free from Taxation, 1 Journal of Public Law 504 (1952); Maclachlan, Bankruptcy 349 (1956). Collier recognizes an exception based on the *Leavy* case where the trustee is merely a collecting agent of the sale tax. 4A Collier, p. 1145, n. 41.

"It may be true that although, in its legal incidence, the sales tax is on the purchaser, it has an indirect economic effect upon the bankrupt estate in that the purchaser, assumedly, would have been willing to pay more had he not been obliged to satisfy the tax. *Such an indirect economic detriment is not an impermissible burden even were the estate a government instrumentality. Cf.* Graves v. New York ex rel. O'Keefe, 1939, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927. Here, however, those ultimately affected are but creditors of the bankrupt. The only burden on the trustee

is the collection and remission of the tax, which we could not consider consequential." (Italics added.)

(2) The decisions of the lower federal courts, even on federal questions, are not binding upon this court. (*People v. Bradley*, 1 Cal.3d 80, 86 [81 Cal.Rptr. 457, 460 P.2d 129]; *People v. Estrada*, 234 Cal.App.2d 136, 145 [44 Cal.Rptr. 165, 11 A.L.R.3d 1307]) "However, they are persuasive and entitled to great weight." (1 Cal.3d at p. 86.) As between the decisions of the Ninth Circuit and that of the Fifth Circuit, no primacy inheres in the former, so the persuasiveness of the conflicting views must depend upon the validity of the arguments made therein. The more recent decision of the Fifth Circuit in *Hatfield* clearly states better reasons and is persuasive authority that even a direct sales tax upon the trustee's sale or a use tax upon Stables' use of the liquidated livestock and equipment would not constitute an unlawful tax on the process of the bankruptcy court. We need not, however, rest our decision upon such holding. (1b) As applied in the case at bench, the tax resulted in an even more "indirect economic detriment" than the court found permissible in *Hatfield* and imposed no burden whatever upon the trustee in "collection and remission of the tax."

In *Hatfield*, the court found that the indirect economic detriment to the bankrupt estate, arising from the assumption that a purchaser would be willing to pay more at a liquidation sale if not obliged to satisfy the tax, did not constitute an "impermissible burden." the detriment here involved is even more remote—it arises from the assumed willingness of a purchaser to pay more by virtue of his ability to relieve his lessee of the obligation to satisfy the tax.

The burden on the trustee of the collection and remission of the tax which the *Hatfield* court did "not consider consequential" is totally absent under the facts of this case. The party who was obliged to collect and remit the taxes was Stables, not the trustee who had no responsibility of any kind in connection therewith. Any claim that the tax constitutes "a license fee required of a federal officer to make liquidation," or "is a tax on the process of the court liquidating assets" (as argued in Judge Fee's concurring opinion in *Goggin* I) is, therefore, wholly untenable. It is thus

clear that under the facts here presented, the collection of the tax presents no real burden upon the liquidation process.

Moreover, plaintiff's argument that taxation of the rental receipts is the equivalent of sales or use taxes upon the trustee's sale to Stables because it is "in lieu thereof" is not persuasive.

Plaintiff concedes the taxability of, and has paid sales tax upon, its outright sales of livestock and equipment purchased from the trustee. Revenue and Taxation Code section 6006, subdivision (g), defines "sale" to include:

"Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:

"

. . . . . .

. . . . . .

"(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement pursuant to Section 6052 or has paid use tax measured by the purchase price of the property. . . . "

The tax payable upon a lease which is deemed a sale is not imposed in lieu of any other tax. It is payable because a lease, like an outright sale, creates a new use that is equated with that incident to a new ownership. Revenue and Taxation Code section 6009 provides in this respect: " 'Use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business."

It is for that reason that the rentals payable are included within the measure of use tax and are exempt from the measure of sales tax. This was pointed out in *Ladd v. State Bd. of Equalization,* 31 Cal.App.3d 35, 39[106 Cal.Rptr. 885], where the court said: "While a lease of tangible personal property has, since August 1, 1965, been included within the definition of a sale (Rev. & Tax. Code § § 6006, subd. (g)(5), and 6010. subd. (e)(5)), the order

of taxation is the inverse of that present in ordinary sales. Rentals payable under a lease of tangible personal property are exempted from the measure of sales tax (Rev. & Tax. code, § 6390). but are included within the measure of use tax. (Rev. & Tax. Code, § 6401.) Rental receipts from a lease of tangible personal property, which would otherwise be so includable, are excluded if the property is leased in substantially the same form as acquierd by the lessor and if the lessor has himself paid sales tax reimbursement or use tax measured by the purchase price to him of the property. (Rev. & Tax. Code, § § 6006. subd. (g)(5), and 6010, subd. (e)(5).)"

(3) The effect of the exemption provided in Revenue and Taxation Code section 6006, subdivision (g)(5), is to afford the lessor of personal property (leased in substantilly the same form as acquired by him) an option whereby the incidence of use tax upon the lease rentals may be diminished in effect by prepayment of the lesser sales or use tax which would have been applicable on account of the lessor's original purchase and storage if the property had not been acquired and stored for resale (Cf. Rev. & Tax. Code, § § 6007, 6008.)

In *Action Trailer Sales, Inc. v. State Bd. of Equal.,* 54 Cal.App.3d 125 [126 Cal.Rptr. 339], this court validated Regulation 1660 (c)(2) of defendant board requiring the lessor to make a timely exercise of the option. In so doing, we stated (54 Cal.App.3d at pp. 131-132):

"Revenue and Taxation Code section 6006, subdivision (g)(5), allows a lessor of tangible personal property leased in substantially the same form as acquired to pay sales tax reimbursement pursuant to section 6052 or use tax measured by the purchase price of the property if the lessor desires to do so rather than to collect sales tax from his lessee. . . .

"

. . . . . .

. . . . . .

"The option of paying sales tax reimbursement pursuant to section 6052 by definition must be exercised with respect to the original acquisition of the property by the lessor by paying sales

tax to the transferor of the property. The next option is that of paying use tax measured by the purchase price of the property. . . .

" . . . . . .

. . . . . .

"The two options embodied in section 6006, subdivision (g)(5), which take a lease out of the category of a sale are couched in the past tense. If the lessor has failed to either pay sales tax reimbursement to the transferor at the time of the transfer of the property or has not timely reported and paid use tax based on the purchase price of the property at the time the property is first placed in rental service, the lease of the property is considered a sale and the lessor is either required to collect use tax from the lessee of the property or pay the amount he should have so collected."

It is apparent from the foregoing that the taxable event is the creation of the lessee's use, and that the primary tax is the use tax upon such lessee's use, measured by the rental receipts. So far as there is any tax payable in lieu of another tax, the sales or use tax measured by the purchase price of the lessor's original purchase is the substitute tax which a lessor may at his option make applicable if timely action is taken by him. In the absence of such timely exercise of the option, the primary tax remains payable. It does not thereby become a tax payable in lieu of the sales and use taxes.

Plaintiff's argument that it should not be required to pay a sales or use tax not legally enforceable against it in order to achieve such benefit overlooks the fact that no lessor who has purchased for resale by leasing is obligated to pay either sales or use tax on account of the original purchase or his storage prior to leasing. Normal operations of the options afforded by section 6006, subdivision (g)(5), is that the lessor pays the lesser tax which was not obligatory in order to avoid the use tax upon the lessee's use based upon the full lease rental.

We, therefore, conclude that even if Stables' original purchase of the livestock and equipment from the trustee in bankruptcy and its use thereof prior to leasing was exempt under the rule stated in the *Goggin* cases, that circumstance would not require exemption from the use tax upon the lessee's use.

The judgment is affirmed.

Ford, P. J., and Allport, J., concurred.

[SNOW SUMMIT LETTER HEAD]

02/17/1986

State Board of Equalization
Department of Business Taxes
Post Office Box 1799
Sacramento, Ca 95808

RE: Account No. SRDH23-742930

Gentlemen:

Pursuant to your letter dated January 27, 1986, Sierra Summit, Inc. petitions for a redetermination on the sales tax owed as a result of lease receipts of equipment from the sale of China Peak Resort, Ltd. Also, Sierra Summit, Inc. would like an informal hearing on the above matter with a hearing officer at the nearest District office of the Board of Equalization.

Sierra Summit, Inc. disagrees with the finding of the sales tax audit on the lease of skis purchased from China Peak Resort, Ltd. The sales tax on the lease receipts are not applicable for the following reasons.

(1) The Judgment filed in the United States Bankruptcy Court July 27, 1983 paragraph 3 states the following.

> "Defendant, California State Board of Equalization, its representatives, agents and employees hereby are permanently restrained and enjoined from commencing or continuing *any act* to impose, determine, assess or enforce a sales or *other tax* against the said receiver, debtor, its principals or *other parties* by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation pursuant to the agreement of purchase . . . "

(2) The auditor based the sales tax on the regulations that state lease receipts are taxable where the lessor has not paid the sales or use tax on the purchase of the leased tangible personal property. However, this is not applicable because the term "lease" is defined to *exclude* the use of tangible personal property for *less than one day* for a charge of *less than $20*, where the *use of the property is restricted to the business location of the seller*. The

rentals of skis are restricted to the business premises of Sierra Summit, Inc., is less than one day, and the charge is substantially below $20.

If the above grounds for rescinding the sales tax on the lease receipts are acceptable then a meeting is not required.

Very truly yours,

ROBERT TARRAS
Controller
Sierra Summit, Inc.
Enclosures

John K. Van de Kamp, Attorney General
of the State of California
Edward P. Hollingshead
Supervising Deputy Attorney General
Derry L. Knight
Deputy Attorney General
1515 K Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5155

Attorneys for State Board of Equalization

In The United States Bankruptcy Court

Eastern District of California

No. 180-01352 Chapter 11

In the Matter of

China Peak Resort, a limited partnership,
Debtor.

Reply Brief by State Board of Equalization
Re Order to Show Cause Re Civil Contempt

This brief is filed, pursuant to the court's briefing schedule set March 5, 1986, in reply to the "Brief in Support of Contempt Citation" filed herein by attorneys for Sierra Summit, Inc. ("Sierra Summit"). By previous response, filed March 5, 1986, the State Board of Equalization ("Board") pointed out that this Court's July 27, 1983 judgment in no way involved, much less resolved, the applicability of the California Sales and Use Tax to *uses made by the purchaser* of property previously purchased from debtor's estate. The use taxes in issue relate to rentals by non-debtor Sierra Summit of ski equipment which was purchased from debtor China Peak. The tax in issue in no way relates to the sale from China Peak to Sierra Summit, and certainly therefore does not impede the China Peak liquidation process.

As more fullly detailed below, it is firmly established by California law that the primary tax in the case of such rentals is

the use tax based upon rental receipts. Such state court construction of California's tax laws are, of course, binding upon federal courts. Sierra Summit's reference to *Goggin II* is wholly misplaced since that case dealt with imposition of a use tax based upon the *purchase* of the property *from the debtor*. Here, the taxable event is a *subsequent use* by the purchaser, and is in no way related to the purchase such as was involved in *Goggin II*.

IMPOSING A TAX ON SUBSEQUENT TAXABLE USES OF PROPERTY WHICH WAS PURCHASED FROM A DEBTOR IN NO WAY IMPEDES THE LIQUIDATION PROCESS

Non-debtor Sierra Summit's sole connection with debtor China Peak Resort was by virtue of the fact that China Peak sold Sierra Summit certain ski equipment, in a sale which this Court concluded was a "liquidation sale" for purposes of the Sales and Use Tax. Subsequent to the purchase, Sierra Summit has made certain uses of the property which, under California law, are taxable uses. Under California law, rentals of certain personal property are considered "sales" for purposes of the sales and use tax law, thus resulting in the imposition of a use tax. Thus, the use tax based upon rental receipts is simply another application of the Sales and Use Tax law to a specific transaction. Just as Sierra Summit would have been subject to the sales tax had it chosen to sell the ski equipment purchased, it is subject to a use tax based upon its rentals of equipment, the taxable event.

Sierra Summit ignores the separate nature, and total separateness of the tax at issue, arguing that somehow the tax is impeding the liquidation process. Clearly it is not. Sierra Summit is attempting to obtain a tax benefit which its competitors do not have, and to which it clearly is not entitled.

Sierra Summit ignores the state court's construction of the subject tax, and attempts to find a connection with a bankruptcy sale by referring to an available election by a purchaser to utilize the purchase price of the property as the measure for the use tax. However, Sierra Summit ignores the fact that state courts have repeatedly concluded that the *taxable event* in such instances is

when the lessor first leases the propety. The taxable event is *not* the purchase.

Indeed, had Sierra Summit chosen not to lease the subject property in substantially the same form as purchased, there would have been no taxable event, and no tax. It was only because Sierra Summit chose to make uses of the propery which were "taxable uses" that the dispute arose.

In short, "the taxable event is the use of the property . . ." (*Union Oil Co. v. State Bd. of Equal.* (19) 60 Cal.2d 441, 446-447; *Action Trailer Sales, Inc. v. State Board of Equalization* (1975) 55 Cal.App.3d 125, 131-132; see also *Debtor re Organizors, Inc. v. State Bd. of Equalization* (1976) 58 Cal.App.3d 691, 698.) Such state court constructions of California's tax laws are, of course, binding upon the federal courts. (*Richfield Oil Corp. v. State Board of Equalization* (1946) 329 U.S. 69.)

Goggin II In No Way Restricts Imposition Of Tax On Taxable Uses Of Property After A Purchase From A Debtor

Sierra Summit places its reliance upon *State Board of Equalization v. Goggin* (9th Cir. 1957) 245 Fed.2d 44 ("*Goggin II*"). Such reliance is wholly misplaced, since *Goggin II* simply dealt with the question of whether or not a use tax could be imposed upon the buyer of property as a result of the *purchase from a debtor*. *Goggin II* simply held that since a sales tax could not be imposed upon the debtor-seller (*California State Board of Equalization v. Goggin* (9th Cir. 1951) 191 Fed.2d 726, cert. den. (1952) 342 U.S. 909 ["*Goggin I*"]), a use tax *based on that same transaction* likewise could not be imposed. The *Goggin* decisions in no way restriced the imposition of otherwise applicable taxes to transactions by the purchaser of the property after the initial purchase from the debtor.

In *Goggin I*, the bankrupt had been adjudicated and an order issued for the total liquidation of the business (191 Fed.2d at 727). Because of this status, the 9th Circuit concluded that in proceeding with the liquidation sale, the trustee was not "conducting any business." Accordingly, the court found 28 United States Code section 960 (which requires debtors conducting business to pay tax as any other non-debtor does) inapplicable.

Goggin I then concluded that the sales tax was inapplicable to the post-adjudication court ordered total liquidation. The court's language is instructive:

> " . . . the fact that the tax has been held applicable [under state law] does not alter the fact that when the trustee in bankruptcy disposed of the trucks here involved '. . . the sale was not made in the course of conducting a business but in the process of putting an end to a business.' " (*Goggin I* at p. 729.)

Goggin II, concerning application of the use tax rather than sales tax, involved a fact "situation [that] was identical" to *Goggin I*. (Goggin II at p. 45.) The *Goggin II* court emphasized that it was the interference with the "essential liquidation process" that posed the problem. (*Goggin II* at pp. 45, 46.)

Here, the tax in issue is a tax based on *rentals* of the property *by the purchaser* Sierra Summit. By no stretch of the imagination can such subsequent taxable use be considered an interference with the bankruptcy court's attempts to liquidate China Peak's business. The references to the *Goggin* decisions are wholly misplaced.

CONCLUSION

For the reasons detailed in the response filed March 5, 1986, and this reply memorandum, it is respectfully requested that the court issue an order dissolving the order to show cause previously issued herein on February 19, 1986. Neither this Court's previous judgment in the debtor proceeding nor the *Goggin* decisions in any way restrict the state from imposing otherwise applicable sales and use taxes upon an entity which happened to purchase the subject equipment from a debtor in bankruptcy.

Dated: March 25, 1986

Respectfully submitted,

John K. Van De Kamp
Attorney General

Edward D. Hollingshead
Supervising Deputy Attorney General
By /s/ DERRY L. KNIGHT
Derry L. Knight
Deputy Attorney General

Attorneys for State Board of Equalization

Appendix H

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

OPPOSITION

BRIEF

(2)

Supreme Court, U.S.
FILED
NOV 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-681

In The

Supreme Court of the United States

October Term, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,

Petitioner,

vs.

SIERRA SUMMIT, INC.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRANK H. LANG, JR.,
Counsel of Record
Attorney at Law
Counsel for Respondent

and

DAVID RAY JENKINS
Of Counsel
Attorney at Law
2307 North Fine Avenue
Fresno, California 93727
(209) 252-3600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

8 pp

TABLE OF CONTENTS

Page

I. THE QUESTIONS PRESENTED HEREIN DO NOT RAISE SPECIAL OR IMPORTANT FEDERAL QUESTIONS SUFFICIENT TO JUSTIFY GRANTING THE PETITION 1

A. Law 1

B. Discussion 2

II. THE BANKRUPTCY COURT HAD JURISDICTION TO ISSUE THE INJUNCTION UNDER WHICH THE CONTEMPT CITATION WAS SOUGHT 3

A. Background 3

B. Discussion 3

III. CONCLUSION 5

TABLE OF AUTHORITIES

Page

CASES

California State Board of Equalization vs. Goggin, 191 F.2d 726 (9th Cir. 1951), cert. den. 342 U.S. 909, 72 S.Ct. 302 ..... 2, 3, 4

Debtor Reorganizers, Inc. vs. Board of Equalization, 58 Cal.App.3d 691, 130 Cal.Rptr. 64 (1976) 3

Gardner vs. New Jersey, 329 U.S. 565, 67 S.Ct. 476 (1947) 4

In re Cusato Brothers International, Inc., 750 F.2d 887 (11th Cir. 1985), cert. den. 472 U.S. 1010, 105 S.Ct. 2707 2

In re Hatfield Construction Co., 494 F.2d 1179 (5th Cir. 1974) 2

In re Leavy, 85 F.2d 25 (2d Cir. 1936) 2

STATUTES

Rule 17.1 of the Rules of the Supreme Court 1

Title 11 U.S.C.:

Section 105 4

Section 105(a) 3, 4

Section 11a(15) 4

No. 88-681

In The

Supreme Court of the United States

October Term, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,

Petitioner,

vs.

SIERRA SUMMIT, INC.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

THE QUESTIONS PRESENTED HEREIN DO NOT RAISE SPECIAL OR IMPORTANT FEDERAL QUESTIONS SUFFICIENT TO JUSTIFY GRANTING THE PETITION.

A. *Law.*

Rule 17.1 of the Rules of the Supreme Court of the United States provides, in pertinent part, as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor

measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . ".

B. *Discussion.*

The questions presented herein, while important to the parties, are quite esoteric. The questions are, also, not often litigated. While it is true that the Ninth Circuit Rule on the question of taxability of bankruptcy liquidation sales conflicts with the Fifth Circuit and Second Circuit Rules, this has been true for over a decade in the case of the Fifth Circuit and for over three decades in the case of the Second Circuit. Compare, *California State Board of Equalization vs. Goggin*, 191 F.2d 726 (9th Cir. 1951), cert. den. 342 U. S. 909, 72 S.Ct. 302 (*"Goggin I"*); *In re Hatfield Construction Co.*, 494 F.2d 1179 (5th Cir. 1974); and *In re Leavy*, 85 F.2d 25 (2d Cir. 1936). See also, *In re Cusato Brothers International, Inc.*, 750 F.2d 887 (11th Cir. 1985), cert. den. 472 U.S. 1010, 105 S.Ct. 2707 wherein the Eleventh Circuit elected to follow *Goggin I.* The conflict between *Goggin I* and *Leavy* existed when the Supreme Court denied certiorari in *Goggin I* and again when certiorari was denied in *Cusato Brothers.* The petitioner has cited no facts to support its implicit contention that the question is any more important now than it was when the Supreme Court last refused to consider it less than four years ago.

This case provides ample evidence of the manner in which the Petitioner has flagrantly disregarded Federal

law as announced in *Goggin I.* (See, also, *Debtor Reorganizers, Inc. vs. Board of Equalization*, 58 Cal.App.3d 691, 130 Cal.Rptr. 64 (1976)). Respondent respectfully submits that public policy would be quite well served by denial of certiorari forcing the Petitioner to finally face the consequences of its longstanding contempt for Federal law.

II

THE BANKRUPTCY COURT HAD JURISDICTION TO ISSUE THE INJUNCTION UNDER WHICH THE CONTEMPT CITATION WAS SOUGHT.

A. *Background.*

This case presents the Petitioner with a serious conceptual problem. The proceeding at the trial court level was a hearing on an Order to Show Cause re Contempt for violation of an injunction issued several years prior to the Order to Show Cause. The injunction was not appealed. Thus, even if this Court should grant certiorari and overrule *Goggin I* and its progeny, it will not change the result in this case. Petitioner attempts to evade this problem by arguing that the injunction was void because the bankruptcy court lacked subject matter jurisdiction.

B. *Discussion.*

In a discussion more noteworthy for its slogans than its analysis, the Petitioner severely criticizes the Ninth Circuit panel for its treatment of the jurisdiction issue accusing them, in effect, of intellectual dishonesty. The Ninth Circuit found jurisdiction under Title 11 U.S.C. Section 105(a) which provides that the Bankruptcy Court has jurisdiction to "issue any order, process, or judgment

that is necessary or appropriate to carry out the provisions of this title". The analysis this Ninth Circuit panel made is identical to that made by the Court in *Goggin I*. See 191 F.2d at 728. The sole difference is that *Goggin I* cited former Title 11 U.S.C. Section 11a(15) rather than Title 11 U.S.C. Section 105(a). Title 11 U.S.C. Section 11a(15) was reenacted in 1978 without any relevant material change as Title 11 U.S.C. Section 105. *Goggin I* also cited as supporting its position *Gardner vs. New Jersey*, 329 U.S. 565, 67 S.Ct. 476 (1947). The Ninth Circuit panel in this case did not in any sense "bootstrap". It followed its own established precedent.

III

CONCLUSION

Certiorari jurisdiction does not exist to provide losing parties with a final opportunity to assuage their egos. There are no issues presented herein which warrant discretionary review by the United States Supreme Court. The petition should be denied.

DATED: November 22, 1988

Respectfully submitted,

FRANK H. LANG, JR.,
Counsel of Record
Attorney at Law
Counsel for Respondent

and

DAVID RAY JENKINS
Of Counsel
Attorney at Law
2307 North Fine Avenue
Fresno, California 93727
(209) 252-3600

JOINT

APPENDIX

(3)

No. 88-681

FILED
JAN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

VS.

SIERRA SUMMIT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

JOHN K. VAN DE KAMP
Attorney General of
the State of California
ROBERT F. TYLER*
Supervising Deputy
Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244- 2550
Telephone: (916) 324-5155

FRANK H. LANG, JR.*
Counsel for Respondent
and
DAVID RAY JENKINS
Of Counsel
2307 North Fine Avenue
Fresno, California 93727
(209) 252-3600

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

44pp

TABLE OF CONTENTS

Page

Cross-references to the appendices of the petition for writ of certiorari ii

Relevant docket entries in the United States Bankruptcy Court for the Eastern District of California in *In Re China Peak Resort* and related adversary proceeding *Richard T. Ford v. California State Board of Equalization* iii

Relevant docket entries in the United States Bankruptcy Appellate Panel for the Ninth Circuit in *China Peak Resort; Sierra Summit, Inc. v. California State Board of Equalization* iv

Relevant docket entries in the United States Court of Appeals for the Ninth Circuit in *California State Board of Equalization v. Sierra Summit, Inc.* iv

Adversary complaint in *Richard T. Ford, Etc. v. California State Board of Equalization,* filed February 11, 1983 ... 1

Findings of fact and conclusions of law in adversary proceeding *Richard T. Ford, Etc. v. California State Board of Equalization,* filed July 27, 1983 4

Response by California State Board of Equalization to order to show cause re contempt, filed March 5, 1986 10

Brief in support of contempt citation, filed March 19, 1986 28

Reply brief by State Board of Equalization re order to show cause re civil contempt, filed March 27, 1986 35

The following opinions, decisions, judgments, orders, and parts of the record to which the parties wish to direct the Court's attention have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari.

	Page
Judgment in *Richard R. Ford, Etc. v. State Board of Equalization,* entered August 2, 1983	P.C. App. A-27-28
Application for order re contempt, filed February 19, 1985	P.C. App. A-24
Opinion of United States Bankruptcy Court for the Eastern District of California, denying application for order re contempt, filed May 9, 1986	P.C. App. A-12
Majority Opinion (with dissent) of Bankruptcy Appellate Panel for the Ninth Circuit reversing decision of Bankruptcy Court, filed July 13, 1987	P.C. App. A-5
Opinion of Ninth Circuit Court of Appeals, filed May 25, 1988	P.C. App. A-1
Decision of Ninth Circuit Court of Appeals, denying rehearing, filed July 22, 1988	P.C. App. A-14

RELEVANT DOCKET ENTRIES

China Peak, United States Bankruptcy Court,
Eastern District of California, No. 180-01352

1980		
8/4/80		Filed Debtor's Petition under Chapter 11 with list of creditors
1981		
12/16/81		Filed Order Confirming Sale
1982		
5/25/82		Filed Order Dismissing Case
6/16/82		Filed Notice of Dismissal of Chapter 11 with certificate of mailing
1983		
2/11/83		Filed Order Approving Reopening of Case
2/11/83	-1-	Filed Adversary proceeding 183-0344 [*Richard T. Ford, Etc. v. California State Board of Equalization*]
7/27/83		Filed Findings of Fact and Conclusions of Law
8/2/83		Judgment
9/7/83		Filed Order Dismissing Case
1986		
2/19/86		Filed Application for Order to Show Cause re contempt—United States Bankruptcy Appellate Panel for the Ninth Circuit No. EC-86-1443 Hearing Set for 3/8/86 at 9:30 a.m.
2/25/86		Filed Ex Parte Application for Order Reopening Case and Order Thereon
3/5/86		Filed Response by State Board of Equalization to Order to Show Cause re Civil Contempt
3/18/86		Case Reopened
3/19/86		Filed Brief in Support of Contempt Citation
3/27/86		Filed Reply Brief by SBE re Civil Contempt
5/9/86		Filed Opinion
5/19/86		Filed Notice of Appeal

5/27/86		Filed Ruling and Order on Application of Sierra Summit, Inc. for Order to Show Cause re contempt (EDD 6/2/86. [*China Peak Resort; Sierra Summit, Inc. v. California State Board of Equalization*]
1987		
7/13/87	7	Opinion—Mooreman, Volinn, Jones,—Reversed and Remanded
8/20/87		Notice of Appeal, Check $100,000 to Circuit [*California State Board of Equalization v. Sierra Summit, Inc.*]; United States Court of Appeals for the Ninth Circuit, No 87-3542
1988		
5/25/88		Filed Opinion (Sneed, Hall, Noonan, author) Affirmed and Remanded to the Bankruptcy Court for Proceedings Consistent with This Opinion Filed and Entered Judgment [87-2542] cek)
6/9/88		[892658] Filed as of 6/8/88 original and 40 copies Appellant CA State Bd. Equaliz. Petition for Rehearing with Suggestion for Rehearing En Banc Panel and All Active) 15 Pages, Served on 6/8/88 (87-2542)
7/22/88		Filed order (Sneed, Hall, Noonan) the petition for Rehearing is Denied and the Suggestion for Rehearing En Banc is rejected. [892638-1] [87-27542] [Entry Date 7/26/88]

In the United States Bankruptcy Court
Eastern District of California
No. 180-01352 Chapter 11
Adversary Proceeding No. 183-0344

In the Matter of
China Peak Resort, Ltd.,
Debtor.

Richard T. Ford, on behalf of
China Peak Resort, Ltd. and on his own behalf,
Plaintiff,

vs.

California State Board of Equalization,
Defendant.

Complaint for Determination of Administrative Tax Liability, for Temporary Injunction and for Temporary Restraining Order

[Filed Feb. 11, 1983]

Plaintiff complains of Defendant and for cause of action allege:

1. This case was commenced by the filing of a voluntary petition for an order for relief under Chapter 11 of Title 11 of the United States Code on August 4, 1980.

2. The Court has jurisdiction of the issues raised by this Complaint under 11 United States Code §§ 105(a), 503 and 505 and 28 United States Code Section 1334 and Local Rule 19.

3. Prior to the commencement of this case, Plaintiff was appointed as Receiver for China Peak Resort, Ltd. in action number 233601-4 in the Superior Court of the State of California for the County of Fresno, entitled "Dorothy Schwartz Rojas, et al. v. Thomas W. Harris, Jr., et al.", and at all times during this case China Peak Resort, Ltd., by and through Plaintiff as its Receiver, was the "Debtor-In-Possession" in the Chapter 11 case, and pursuant to the provisions of the Code had all the right powers and duties of a Trustee under the Bankruptcy Code.

4. On or about December 21, 1981, China Peak Resort, Ltd. as debtor-in-possession, by and through Richard T. Ford, its Receiver, sold all or substantially all, of the assets of said debtor

to Snow Summit Ski Resort, Inc. pursuant to an Agreement of Sale, approved by Order Confirming Sale filed in this bankruptcy case on December 16, 1981.

5. From the proceeds of said sale all of the creditors of China Peak Resort, Ltd. were paid and all of the administrative expense in this case of Richard T. Ford, as Receiver, were paid, and to the best of Plaintiff's information and knowledge and belief there are currently no creditors of said debtor or Receiver, other than the alleged obligations, the subject hereof.

6. On or about January 1, 1983 Defendant, California State Board of Equalization, assessed or determined a sales tax of approximately $55,000.00 in the names of the principals of the debtor and of Plaintiff, as Receiver, alleged to be due by reason of the sale of all of the assets of said debtor to Snow Summit Ski Resort, Inc. ("Snow Summit") made subject to the jurisdiction of and approved by the Court in this case.

7. The attempted determination or assessment of sales tax liability in connection with the liquidation sale of the assets of debtor in this case constitutes the assertion of an administrative tax liability subject to determination by this Court under the terms and provisions of Sections 105(a), 503 and 505 of Title 11 of the United States Code.

8. The debtor's estate and Receiver have no liability for a California Sales Use Tax in connection with the said described sale. The Court of Appeals for the 9th Circuit has clearly and without ambiguity decided the issue raised in this case by the California State Board of Equalization adverse to the California State Board of Equalization.

9. In order to prevent immediate and irreparable injury and harm to said debtor, its principals and Plaintiff, it is necessary and imperative that this Court forthwith issue its order directing Defendant, California State Board of Equalization, to be and appear before it at a time certain then and there to show cause, if any it may have, why this Court should not make an order temporarily enjoining the commencement or continuation of any and all acts in furtherance of or designed to enforce the alleged tax liability against any party; and temporarily restraining said California State Board of Equalization, its agents, employees and

representatives, pending hearing on said Order to Show Cause from continuing or commencing any and all acts for the purpose of or design to enforce said alleged tax liability against any party.

Wherefore, Plaintiff prays:

1. For issuance of an Order to Show Cause to Defendant, California State Board of Equalization, requiring it to be and appear before this Court at a time certain then and there to show cause, if any it may have, why this Court should not make an order temporarily enjoining the commencement or continuation of any and all acts in furtherance of or designed to enforce the alleged tax liability against any party; and temporarily restraining said California State Board of Equalization, its agents, employees and representatives, pending hearing on said Order to Show Cause from continuing or commencing any and all acts for the purpose of or the designed to enforce said alleged tax liability against any party;

2. For judgment determining that said debtor and Plaintiff, and any and all other parties which may have any obligation in connection therewith, have no liability or obligation to Defendant, California State Board of Equalization, for any sales or use tax in connection with the sale of all or substantially all of the assets of said debtor to Snow Summit Ski Resort, Inc., described hereinabove, and particularly no liability in connection with the assessment or determination heretofore made by said Defendant;

3. For judgment permanently enjoining said Defendant from any and all acts to attempt to assess, reassess or enforce any tax or tax obligation in connection with said sale against any party herein described;

4. For an award to Plaintiff of its expenses incurred in connection with said assessment including its costs in this case; and

5. For such other and further relief as the Court may deem proper in the premises.

Dated: February 11, 1983.

By /s/ FRANK H. LANG, JR.
Frank H. Lang, Jr.,
Attorneys for Plaintiff

Frank H. Lang, Jr., #032557
Fullerton, Lang, Richert & Patch, P.C.
Post Office Box 11926
Fresno, California 93775
(209) 486-3011
Attorneys for Plaintiff

In the United States Bankruptcy Court
Eastern District of California

No. 180-01352 Chapter 11
Adversary Proceeding No. 183-0344

In the Matter of
China Peak Resort, a limited partnership,
Debtor,

Richard T. Ford, on behalf of China Peak Resort, Ltd., and on his own behalf,
Plaintiff,

vs.

California State Board of Equalization,
Defendant.

Findings of Fact and Conclusions of Law

Upon the Complaint of Plaintiff filed February 11, 1983 and Answer of Defendant, California State Board of Equalization, dated March 30, 1983; the Court having received written arguments of the parties relating both to Defendant's objection to jurisdiction and the substantive issues of the case, and the facts having been communicated to the Court by written argument of the parties appearing to be uncontroverted, and both parties having waived a factual hearing and upon said facts and documents submitted, including, without limitation, the following pleadings filed in this bankruptcy case:

1. Stipulation and Order thereon filed September 15, 1980;

2. Amended Order Appointing Receiver, filed October 17, 1978;

3. Findings of Fact and Conclusions of Law and Judgment, filed November 12, 1980;

4. Application for Order Dismissing Case, filed May 3, 1982; and

5. Order Dismissing Case, filed May 24, 1982 and the following pleadings filed in the "State Court" action including:

1. Findings of Fact and Conclusions of Law, filed September 3, 1981;

2. Judgment of Foreclosure and Order of Sale, filed September 3, 1981; and

3. Thirteenth Account and Report of Receiver and Petition for Compensation on Account, filed April 29, 1982, and including the Agreement of Purchase and Sale and Escrow Instructions dated December 3, 1981.

The Court makes its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

The Court finds that:

1. During the late 1970's China Peak Resort, a California limited partnership, was formed with Thomas Harris, Jr. and Gary G. Bagdasarian, as general partners, and Dorothy Schwartz (Rojas) and/or DOT Investment Corporation, as limited partner. The partnership purchased the assets of the China Peak Ski area and commenced operation of the ski resort.

2. On September 9, 1978 an action entitled "Dorothy Schwartz, et. al. v. Thomas W. Harris, et. al." was filed in the Fresno County Superior Court (action number 233601-4), which was subsequently combined with Kings County Superior Court number 30625 under Judicial Council Coordination Proceeding No. 950 (for dissolution of the limited partnership, damages and other relief. That action is hereinafter referred to as the "State Court Action").

3. On October 11, 1978 an Order was made in the State Court Action appointing Richard T. Ford as Receiver to take possession of the assets of the debtor and operate the ski resort business. On October 17, 1978 an Order entitled "Amended Order Appointing Receiver" was filed in the State Court Action effecting approximately the same relief.

4. On August 4, 1980 and during the pendency of the State Court Action, China Peak Resort, Ltd. ("the debtor") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code commencing this bankruptcy case.

5. On August 7, 1980 Dorothy Rojas filed a Motion in the Chapter 11 case to dismiss the case and in the alternative a Complaint for relief from stay re the State Court Action. The hearings on the Motion and Complaint were continued to and held on September 2, 1980 and resulted in a "Stipulation and Order Thereon" filed September 15, 1980, which generally provided for: (a) the authorization of Richard T. Ford, as Receiver of China Peak Resort, Ltd. to remain in possession of the debtor's assets "subject to such supervision by the United States District Court as is allowed by the Bankruptcy Reform Act of 1978 until such time as further Order is entered by the United States Bankruptcy Court", (b) for modification of the 362 stay so as to allow the State Court Action to proceed, and (c) for the authorization of the Receiver to begin efforts to sell the assets of the ski resort business and provided that "any sale shall be consummated pursuant to the terms of the Bankruptcy Reform Act of 1978".

6. Richard T. Ford, as Receiver, and as and for the debtor-in-possession in the Chapter 11 case proceeded to continue operation of the ski resort and commenced and continued efforts to sell the assets of the ski resort business.

7. Pursuant to trial of the State Court Action on January 5, 1981 and February 13, 1981, the jury returned a general verdict in favor of the Plaintiff, and pursuant to the verdict Findings of Fact and Conclusions of Law were adopted and filed on September 3, 1981, including among the said conclusions of law, the following:

> "8. Subject only to the jurisdiction of the Bankruptcy Court of the U.S. District Court Eastern District of California, and the United States Forest Service, Defendants Thomas W. Harris, Jr., Judith A. Harris, Gary G. Bagdasarian and Susan E. Bagdasarian, each hold, and have held, since February 16, 1978, all of the assets of China Peak Resort, a limited partnership, and of China Peak Ski resort, as constructive trustees for the benefit of Rojas (Plaintiff).

> (c) In the event the Bankruptcy Court of the U.S. District Court, Eastern District of California, fails for any reason to determine that Thomas W. Harris, Jr., Judith A. Harris, Gary G. Bagdasarian or Susan E. Bagdasarian hold all of the assets of China Peak Resort, a limited partnership, and China Peak Ski Resort, as constructive trustees for the benefit of Rojas, or the United States Forest Service revokes or withdraws any of the permits it has heretofore issued to China Peak Resort, a limited partnership, as a result of the imposition of such constructive trust, then this Order imposing such constructive trust shall be rescinded in the provisions of sub-paragraphs (a) and (b) hereof shall be of no force and effect. In such event this Court under its jurisdiction reserve to it herein shall make its Order granting Rojas a security interest in and to all of the assets of said limited partnership and said China Peak Ski Resort as such security interest is described in that certain Agreement for Granting of Security referred to herein, and the exhibits attached hereto . . . ".

8. On September 1, 1981 negotiations for the sale of all of the assets of the resort were commenced between Mr. Ford and Snow Summit Ski Corporation. These negotiations resulted in the "Agreement of Purchase and Sale and Escrow Instructions" dated December 3, 1981, and the Agreement was conditioned upon approval of the United States Bankrupty Court in the Chapter 11 case, was duly returned for approval and an "Order Confirming Sale" approving said sale was filed in the bankruptcy case on December 16, 1981.

9. On May 3, 1982 Mr. Ford filed an Application for Order Dismissing Case; Notice of Application, which was duly noticed and heard, and an Order dismissing the case was filed May 24,

1982, and pursuant to that Order the case was dismissed "with prejudice".

10. Mr. Ford filed sales tax returns with the Defendant reporting sales made in connection with the operation of the ski resort business for all periods relevant and paid taxes due thereon. On or about January 13, 1983 Defendant California State Board of Equalization assessed or determined a sales tax of approximately $55,000.00 in the names of the principals of the debtor and Richard T. Ford as Receiver alleged to be due by reason of the sale of all of the assets of the said debtor to Snow Summit Ski Corporation pursuant to the Agreement of Sale and Escrow Instructions referred to hereinabove approved by the Order filed December 16, 1981.

11. The sale to Snow Summit Ski Corporation included all of the operating assets of the debtor and substantially all of the assets of the debtor. Subsequent to the consummation of the sale Mr. Ford's activities included payment of operating bills, collection of a note receivable (which did not arise from operation of the business), continued defense of two (2) lawsuits (through the insurer), arising from the ski resort business, cooperation with the United States Forest Service and California Board of Equalization in conducting audits of the debtor's records and preparation and filing of his accounts.

12. On February 11, 1983 Richard T. Ford on his own behalf and on behalf of the debtor, filed an Application with this Court for an Order reopening the Chapter 11 case by reason of the assessment of the sales tax by Defendant, State Board of Equalization and an Order was made reopening the case on February 11, 1983. Plaintiff filed the "Complaint for Determination of Administrative Tax Liability, For Temporary Injunction and for Temporary Restraining Order" on February 11, 1983 commencing this adversary proceeding.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact the Court concludes that:

1. This Court has jurisdiction to determine the validity and legality of the tax assessment by Defendant, California State Board of Equalization, against the debtor-in-possession and the Receiver of the debtor-in-possession assessed by reason of the sale of the debtor's assets pursuant to the Agreement of Purchase and Sale and Escrow Instructions dated September 3, 1981, and approved by this Court's "Order Confirming Sale" filed December 16, 1981 under and pursuant to 11 United States Code Section 505(a)(1) and under 11 United States Code Section 503(b).

2. This Court has jurisdiction to reopen the Chapter 11 case for the purpose of making the determinations of the legality and validity of the tax assessment pursuant to the above cited statutes.

3. A debtor-in-possession or Trustee operating a business in a Chapter 11 case has the authority, subject to the approval of the Bankruptcy Court, to sell during the Chapter 11 case all of the operating assets of the debtor. The sale effected by the Agreement of Purchase and Sale and Escrow Instructions dated December 3, 1981 and approved by Order Confirming Sale filed December 16, 1981, was a sale of all of the operating assets of the debtor in this case and was therefore a "liquidation" sale.

4. The liquidation sale of the debtor's assets affected by the Agreement of Purchase and Sale and Escrow Instructions dated December 3, 1981 and approved by the Court's Order Confirming Sale filed December 16, 1981 is not a sale subject to imposition of a sales tax by Defendant or the State of California pursuant to 28 United States Code Section 960 and the case of *California State Board of Equalization v. Goggin*, 191 F.2d 726 (9th Cir. 1951), cert. den. 342 U.S. 909 (1952) and *State Board of Equalization v. Goggin*, 245 F.2d 94 (9th Cir. 1957), cert. den. 353 U.S. 961 (1957).

Dated: July , 1983.

United States Bankruptcy Judge

John K. Van De Kamp, Attorney General
of the State of California
Edward P. Hollingshead
Supervising Deputy Attorney General
Derry L. Knight #48121
Deputy Attorney General
1515 K Street
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5155

Attorneys for California
State Board of Equalization

United States Bankruptcy Court
Eastern District of California

No. 180-01352 Chapter 11

In the Matter of
China Peak Resort, a limited partnership,
Debtor.

Response by State Board of Equalization
to Order to Show Cause Re Civil Contempt

Date: March 5, 1986
Time: 9:30 a.m.
Dept. Hon. E. A. Thompson

INTRODUCTION

The State of California, State Board of Equalization (hereinafter "Board"), hereby responds to the court's order entered February 19, 1986, directing it to show cause why it should not be held in contempt. The show cause order was issued based on the application of Sierra Summit, Inc. ("Sierra Summit"), the purchaser of certain assets from China Peak Resort (hereinafter "debtor"), a debtor formerly before this Court. Sierra Summit, the purchaser, erroneously attempts to insulate itself from its sales and use tax obligation by making reference to a prior dispute between the Board and debtor China Peak Resort.

As more fully detailed below, the prior matter before this Court in no way resolved, or even dealt with, the impact upon the purchaser of its taxable use of the property purchased. Sierra Summit's remedy is to proceed, as it has already initiated, through the state administrative procedures, and then by a state court suit for refund should that be necessary. The federal courts, including the bankruptcy court, are wholly without jurisdiction to decide the propriety of a tax assessment against a nondebtor such as Sierra Summit.

I

THIS COURT'S PRIOR DECISION HAD NO BEARING UPON THE TAX OBLIGATIONS OF THE PURCHASER OF DEBTOR'S PROPERTY

Sierra Summit asserts that this Court's July 27, 1983 "Judgment" (Exh. "A" to application filed February 19, 1986) bars the imposition of taxes upon the purchaser as a result of taxable uses made of certain of the property purchased from debtor. Sierra Summit, through selective emphasis, attempts to suggest that this Court previously prohibited tax upon the purchaser's taxable uses of the property. Such an erroneous reading of the Judgment can only flow from the failure to note that the Judgment merely prohibited the imposition of a tax "by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation . . . ." (¶ 3 of Judgment). Sierra Summit emphasizes the fact that the Judgment made reference to prohibiting the tax against the receiver or other parties, but attempts to ignore the fact that the entire dispute was over the taxability of the *sale* of the assets *by China Peak* Resort. The prior Judgment clearly was not directed at prohibiting any subsequent tax on the buyer as a result of its possible resale, or as here, rental of the equipment, where such transactions are otherwise subject to tax.

The Court's July 27, 1983 Judgment is, in the Board's view, clear in its inapplicability to subsequent taxable uses by the buyer. However, any possible ambiguity is eliminated by a reference to the findings of fact and the complaint which framed the issues of the prior dispute.

The findings of fact, which presumably were also signed by the court on July 27, 1983, refer at paragraph 10 to the assessment of sales tax which was then in dispute. The findings make it clear that the concern was with the imposition of a tax upon the principals of debtor and Richard T. Ford, as receiver, and were in no way a determination that sales or uses of the property would no longer ever be subject to a sales tax by the purchaser or subsequent purchasers. Paragraph 10 of the findings of fact thus state that

> "On or about January 13, 1983 Defendant California State Board of Equalization assessed or determined a sales tax of approximately $55,000.00 in the names of the principals of the debtor and Richard T. Ford as Receiver alleged to be *due by reason of the sale* of all of the assets of the said debtor *to Snow Summit Ski Corporation* . . . ." (Emphasis supplied.)

This Court then issued its conclusions of law to the effect that the subject sale was a "liquidation" sale, which had the effect of insulating *that sale* from imposition of the sales or use tax. This conclusion was reached based on the Ninth Circuit Court of Appeals *Goggin* decisions. (Findings and conclusions, pp. 7-8.)

The limited nature of the prior dispute is further revealed by a review of the Complaint for Determination of Administrative Tax Liability . . . , which pleading ultimately led to entry of the July 27, 1983 Judgment. The Complaint, filed February 11, 1983, thus sets forth at paragraph 6, virtually verbatim, the nature of the dispute as quoted above from the Findings of Fact. The Complaint then, at paragraph 8, further emphasizes this point by asserting that "The debtor's estate and Receiver have no liability for a California Sales Use Tax [sic] *in connection with the said described sale* . . . ." (Emphasis supplied.)

The review of the Judgment, Findings, and Complaint in the matter previously before this court thus establish beyond question that subsequent taxable uses by the buyer, Sierra Summit, were in no way either considered or even tangentially before the court. This Court, therefore, has no jurisdiction nor authority to insulate the subject nondebtor from the state's otherwise applicable taxes.

II

THE PRESENT PROPOSED ASSESSMENT AGAINST PURCHASER SIERRA SUMMIT IS PROPER, IS PRESENTLY UNDER REVIEW AT ADMINISTRATIVE LEVEL, AND IS BEYOND THIS COURT'S JURISDICTION TO RESOLVE

A. The Tax Proposed on the Rental Receipts Is the Primary Tax, and Is Properly Imposed Against Sierra Summit

Sierra Summit objects to the Board-proposed assessment to the extent it imposes a use tax measured by gross receipts from its rentals of various ski equipment. Some of the rental ski equipment was apparently purchased from debtor China Peak. The California courts of appeal have repeatedly held that the tax payable upon rentals of specified property "is not imposed in lieu of any other tax. It is payable because a lease, like an outright sale, creates a new use that is equated with that incident to a new ownership." (*Debtor Reorganizers, Inc. v. State Bd. of Equalization* (1976) 58 Cal.App.3d 691, 698.) Other decisions expanding upon the nature of this separate taxable event are *Action Trailer Sales, Inc. v. State Board of Equalization* (1975) 54 Cal.App.3d 125, and *Ladd v. State Bd. of Equalization* (1973) 31 Cal.App.3d 35, 38 et seq.

Debtor Reorganizers involves a fact situation identical to that presented in the instant proceeding. As in this case, plaintiff Debtor Reorganizers attempted to insulate itself from responsibility for the use tax based on rental receipts on equipment which it had purchased from a trustee in bankruptcy. Debtor Reorganizers was unsuccessful, since the taxable event is the subsequent *use* of the property and not the sale by the debtor. A copy of the *Debtor Reorganizers* decision is attached for the ready reference of the court.

In short, the tax in issue is a tax based upon a subsequent use by the purchaser, and is not a tax in any way tied to the previous sale by the trustee in bankruptcy. The subject tax, much like the sales tax upon any resale by Sierra Summit, is properly imposed by the Board.

B. Taxpayer Sierra Summit Is Presently Pursuing Its Available Remedies for a Review of the Subject Assessment

Taxpayer Sierra Summit has available to it a wholly adequate state remedy to contest the application of the sales tax. Indeed, Sierra Summit has already petitioned for redetermination of the subject tax, as evidenced by the attached 2/17/86 letter to the State Board of Equalization. The state administrative process, and available judicial review, provide the taxpayer with a wholly adequate remedy.

III

GIVEN THE INAPPLICABILITY OF THE PRIOR JUDGMENT OF THIS COURT, THE COURT LACKS JURISDICTION TO DETERMINE THE NON-DEBTOR'S TAX LIABILITY

A. Tax Injunction Act Deprives Federal Court of Jurisdiction

The existence of a state refund action, such as provided by the California Sales and Use Tax Law, invokes the restraints of the "Tax Injunction Act," which deprives the federal courts of jurisdiction. (*Kelly v. Springett* (9th Cir. 1975) 527 F.2d 1090, 1093-1094; *Bland v. McHann* (5th Cir. 1972) 463 F.2d 21, cert. den. (1973), 410 U.S. 966.)

This historic rule, which prevents the federal courts from interfering with the internal fiscal operations of the states, has been codified in 28 United States Code section 1341:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

It is well established that 28 United States Code section 1341 is an explicit congressional limitation on the jurisdiction of the federal courts in cases which would enjoin or suspend state tax levy, assessment, or collection. (*California v. Grace Brethren* (1982) 457 U.S. 393, 407 et seq.; *Randall v. Franchise Tax Board of the State of California* (9th Cir. 1971) 453 F.2d 381;

Dillon v. State of Mont. (9th Cir. 1980) 634 F.2d 463, 466 et seq.)

In this case, non-debtor Sierra Summit's proper plain, speedy and efficient remedy is to continue to pursue its administrative petition for redetermination and, if necessary, to pursue a suit for refund in the California courts. (See, Cal. Rev. & Tax. Code § 6931 et seq.) It is the duty of the federal courts to defer to such state administrative and judicial remedies when available for a taxpayer's redress. (*Kelly v. Springett, supra,* 527 F.2d at pp. 1093-1094; *Bland v. McHann, supra,* 463 F.2d 21, cert. den. 410 U.S. 966; *Grace Brethren, supra,* 457 U.S. at pp. 407-417.)

B. Federal Courts Should Abstain from Accepting Jurisdiction

In any event, the federal court should abstain from accepting jurisdiction under the principle of federal equitable jurisdiction which restrains the federal court from interference with the internal fiscal operations of the states. (*Great Lakes Dredge & Dock Co. v. Huffman* (1943) 319 U.S. 293.)

CONCLUSION

As further detailed above, this Court's prior Judgment in no way involved, much less resolved, the applicability of the California sales and use tax to *uses made by a purchaser* of property previously purchased from a debtor's estate. Given the absence of a connection between the prior Judgment and the present proceeding, the matter of the non-debtor Sierra Summit's tax liability is properly left to the wholly adequate and available state administrative and judicial remedies, which remedies taxpayer has already initiated. The federal courts lack jurisdiction to deal with such matters.

Accordingly, it is respectfully requested that the court issue an order dissolving the Order to show cause previously issued herein on February 19, 1986.

DATED: March 4, 1986

Respectfully submitted,

John K. Van De Kamp
Attorney General
Edward P. Hollingshead
Supervising Deputy
Attorney General

/s/ DERRY L. KNIGHT
Derry L. Knight
Deputy Attorney General

Attorneys for California
State Board of Equalization

Opinion (*Mueller v. MacBan*) on pages 667-690 omitted.
Rehearing Granted

[Civ. No. 46855, Second Dist., Div. Three, May 26, 1976.]

Debtor Reorganizers, Inc., Plaintiff and Appellant, v. State Board of Equalization, Defendant and Respondent.

OPINION

POTTER, J.—Plaintiff Debtor Reorganizers, Inc. appeals from a summary judgment in favor of defendant in plaintiff's action to recover use taxes in the sum of $27,905.60 paid by plaintiff's assignor Fat Jones Stables, Inc. (hereinafter referred to as "Stables"), in respect of which a claim for refund was made by Stables and denied by defendant board. The taxes in question were for the period January 1, 1966 through October 12, 1969, during which period Stables was engaged in the business of selling and leasing equipment and livestock which had been purchased from a trustee in bankruptcy in the course of liquidation of a bankrupt estate pursuant to an order of the United States District Court.

Stables collected and remitted sales taxes on all outright sales of such livestock and equipment each quarter as the sales were made. It did not pay sales or use taxes in respect of the rental receipts of livestock and equipment leased by it. Defendant board served a notice of determination requiring payment of "use tax applied to rental receipts derived from petitioner's leases of livestock and equipment purchased from the trustee in bankruptcy. . . ." Payment was made by Stables in accordance with the notice of redetermination and a claim for refund was filed.

Both plaintiff and defendant moved for summary judgment. There was no dispute as to the facts and the trial court concluded therefrom that use tax was payable based upon such rental receipts.

Contentions

Plaintiff contends that the sale of the livestock and equipment to Stables by the bankruptcy trustee, and the use by Stables of

such property were not subject to sales or use tax because the imposition of a tax would be an unauthorized burden on the process of liquidation and that the use tax collected "is only imposed in lieu of the tax" which "the State is prohibited from collecting."

Defendant board contends that the claimed exemption of the sale by the trustee to Stables and of Stables' use is of questionable validity and that in any event the tax upon the rental receipts is not a tax in lieu of such sales or use tax.

Discussion

We conclude that the application of the use tax found proper in the trial court does not constitute an unlawful interference with the process of the bankruptcy court, and we therefore affirm.

Plaintiff's claim that both the original liquidation sale from the trustee to Stables and Stables' subsequent use of the property purchased are exempt from taxation is based upon the decisions of the United States Court of Appeals for the Ninth Circuit in *California State Board of Equalization v. Goggin* (9th Cir. 1951) 191 F.2d 726 [27 A.L.R.2d 1211] [*Goggin I*] cert. den., 342 U.S. 909 [96 L.Ed. 680, 72 S.Ct. 302], and *California State Board of Equalization v. Goggin* (9th Cir. 1957) 245 F.2d 44 [*Goggin II*] cert. den., 353 U.S. 961 [1 L.Ed.2d 910, 77 S.Ct. 863]. In *Goggin I*, the Ninth Circuit held the district court acted properly in affirming a referee's order enjoining the board from enforcing a claim of sales tax liability based upon liquidation sales made by the trustee in bankruptcy. The sales were made by the trustee without adding sales tax to the purchase price and the board made an additional determination of taxes for which demand for payment was made. The court stated the issue as follows: "The question remains whether or not the California sales tax applies to liquidation sales of personal property made by a trustee in bankruptcy pursuant to court order." (191 F.2d at p. 729.)

The California Sales Tax Law was construed by the court as applying only to a seller who is "*conducting a retail business.*" (*Id.*) The court said: " '[T]he sale was not made in the course of conducting a business but in the process of putting an end to a

business.' " (*Id.*) Such interpretation of the California statute was found to make it consistent with the federal statute "making officers appointed by United States courts liable for state taxes if they 'conduct any business.' [Fn. omitted.]" (191 F.2d at p. 730.) Judge Fee, then a district judge, concurred but upon the basis that the state had no power to thus tax the process of liquidation. Judge Fee said in this respect (*Id.*): "A tax on this transaction, whatever form it takes, is a tax on the process of the Court liquidating assets in accordance with constitutional power. In another aspect, it may be considered as a license fee required of a federal officer to make liquidation. In either event, it is void. A tax may be levied upon specific property in the hands of a trustee in bankruptcy. [Citation.] But no state is empowered to levy taxes upon the process of the courts of the United States or to impede the officers of court in an essential judicial function. [Citation.] The District Court held as a fact that the transaction was in the nature of liquidation and was not a state tax upon the business of constructing and selling cabinets conducted by the trustee, who was authorized thereto by the United States Court. [Citation.] This finding of fact is binding unless clearly erroneous. [Citation.] Under such conditions, neither enactments of the State of California nor decisions of state courts nor practices of state administrative bodies can burden or impede administration of acts relating to bankruptcies. [Citation.]"

In *Goggin II*, Judge Fee, as a regular member of the court, authored the opinion. The board had again attempted to tax a liquidation sale of bankruptcy assets, seeking to avoid the effect of the first decision by calling it a use tax upon the purchaser which the trustee was required to collect.

This distinction was held irrelevant. Reference was again made to the federal statute "permitting officers of the bankruptcy court to pay taxes to the state for acts done in the conduct of the business" (245 F.2d at p. 45) as excluding taxability of acts done in liquidation, and the court said (*id.*): "In practice, if the sales tax were levied upon the Trustee, he would necessarily have passed the tax on to the purchaser. The same result is attained by taxing the purchaser and requiring the Trustee to collect or

collecting the impost from the purchaser. All these devices are proscribed as to liquidating sales in bankruptcy. [Fn. omitted.]"

A contrary conclusion has been reached by the United States Court of Appeals for the Fifth Circuit in a more recent case, *In re Hatfield Construction Company* (5th Cir. 1974) 494 F.2d 1179. In that case, the Commissioner of Revenue of the State of Georgia was held entitled to require payment of sales tax upon liquidation sales made by a trustee in bankruptcy. The court observed that "the liability for sales tax under the Georgia Act is imposed primarily on the purchaser with secondary liability on the seller to collect and remit the tax." (494 F.2d at p. 1180.) The situation was, therefore, indistinguishable from that presented in the *Goggin* II decision. Referring to the federal statute cited in the *Goggin* decisions, the court said (494 F.2d at p. 1181): "We do not read this statute as precluding or limiting the state taxing process in the circumstances obtaining here. Indeed, it has been long settled that property in the hands of a trustee in bankruptcy is not thereby exempt from state and local taxes, absent a clear expression from Congress to the contrary. Swarts v. Hammer, 1904, 194 U.S. 441, 24 S.Ct. 695, 48 L.Ed. 1060. Section 960 is not such a clear expression, at least where the tax on the liquidating function is imposed on the purchaser in liquidation. This was the view of the Second Circuit in *Leavy, supra*, and it is a view tangentially supported by Missouri v. Gleick, 8 Cir., 1943, 135 F.2d 134, where a liquidation trustee was held liable for Missouri unemployment tax. *See also* In re Mid America Co., S.D.Ill., 1939, 31 F.Supp. 601, 606; In re Loehr, E.D.Wis., 1950, 98 F.Supp. 402; Note, State Taxation of Bankruptcy Liquidation: Federalism Misconceived, 67 Yale L.J. 335 (1957); Wurzel, Taxation During Bankruptcy Liquidation, 55 Harv.L. Rev. 1141, 1166 (1942). *Contra:* 4A Collier on Bankruptcy, ¶ 70.97 [4]: Paskay, Handbook for Trustees and Receivers in Bankruptcy, § 14.005; Note, Bankruptcy Sale as a Judicial Sale Free from Taxation, 1 Journal of Public Law 504 (1952); Maclachlan, Bankruptcy 349 (1956). Collier recognizes an exception based on the *Leavy* case where the trustee is merely a collecting agent of the sales tax. 4A Collier, p. 1145, n. 41.

"It may be true that although, in its legal incidence, the sales tax is on the purchaser, it has an indirect economic effect upon the bankrupt estate in that the purchaser, assumedly, would have been willing to pay more had he not been obliged to satisfy the tax. *Such an indirect economic detriment is not an impermissible burden even were the estate a government instrumentality. Cf.* Graves v. New York ex rel. O'Keefe, 1939, 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927. Here, however, those ultimately effected are but creditors of the bankrupt. The only burden on the trustee is the collection and remission of the tax, which we could not consider consequential." (Italics added.)

The decisions of the lower federal courts, even on federal questions, are not binding upon this court. (*People v. Bradley*; 1 Cal.3d 80, 86 [81 Cal.Rptr. 457, 460 P.2d 129]; *People v. Estrada*, 234 Cal.App.2d 136, 145 [44 Cal.Rptr. 165, 11 A.L.R.3d 1307]) "However, they are persuasive and entitled to great weight." (1 Cal.3d at p. 86.) As between the decisions of the Ninth Circuit and that of the Fifth Circuit, no primacy inheres in the former, so the persuasiveness of the conflicting views must depend upon the validity of the arguments made therein. The more recent decision of the Fifth Circuit in *Hatfield* clearly states better reasons and is persuasive authority that even a direct sales tax upon the trustee's sale or a use tax upon Stables' use of the liquidated livestock and equipment would not constitute an unlawful tax on the process of the bankruptcy court. We need not, however, rest our decision upon such holding. As applied in the case at bench, the tax resulted in an even more "indirect economic detriment" than the court found permissible in *Hatfield* and imposed no burden whatever upon the trustee in "collection and remission of the tax."

In *Hatfield*, the court found that the indirect economic detriment to the bankrupt estate, arising from the assumption that a purchaser would be willing to pay more at a liquidation sale if not obliged to satisfy the tax, did not constitute an "impermissible burden." The detriment here involved is even more remote—it arises from the assumed willingness of a purchaser to pay more by virtue of his ability to relieve his lessee of the obligation to satisfy the tax.

The burden on the trustee of the collection and remission of the tax which the *Hatfield* court did "not consider consequential" is totally absent under the facts of this case. The party who was obliged to collect and remit the taxes was Stables, not the trustee who had no responsibility of any kind in connection therewith. Any claim that the tax constitutes "a license fee required of a federal officer to make liquidation," or "is a tax on the process of the court liquidating assets" (as argued in Judge Fee's concurring opinion in *Goggin* I) is, therefore, wholly untenable. It is thus clear that under the facts here presented, the collection of the tax presents no real burden upon the liqudation process.

Moreover, plaintiff's argument that taxation of the rental receipts is the equivalent of sales or use taxes upon the trustee's sale to Stables because it is "in lieu thereof" is not persuasive.

Plaintiff concedes the taxability of, and has paid sales tax upon, its outright sales of livestock and equipment purchased from the trustee. Revenue and Taxation Code section 6006, subdivision (g), defines "sale" to include:

"Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:

". . . . . .

"(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement pursuant to Section 6052 or has paid use tax measured by the purchase price of the property. . . ."

The tax payable upon a lease which is deemed a sale is not imposed in lieu of any other tax. It is payable because a lease, like an outright sale, creates a new use that is equated with that incident to a new ownership. Revenue and Taxation Code section 6009 provides in this respect: " 'Use' includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also includes the possession of, or the exercise of any right or power over, tangible personal property

by a lessee under a lease, except that it does not include the sale of that property in the regular course of business."

It is for that reason that the rentals payable are included within the measure of use tax and are exempt from the measure of sales tax. This was pointed out in *Ladd v. State Bd. of Equalization,* 31 Cal.App.3d 35, 39 [106 Cal.Rptr. 885], where the court said: "While a lease of tangible personal property has, since August 1, 1965, been included within the definition of a sale (Rev. & Tax. Code §§ 6006, subd. (g)(5), and 6010, subd. (e)(5)), the order of taxation is the inverse of that present in ordinary sales. Rentals payable under a lease of tangible personal property are exempted from the measure of sales tax (Rev. & Tax. Code, § 6390), but are included within the measure of use tax. (Rev. & Tax. Code, § 6401.) Rental receipts from a lease of tangible personal property, which would otherwise be so includable, are excluded if the property is leased in substantially the same form as acquired by the lessor and if the lessor has himself paid sales tax reimbursement or use tax measured by the purchase price to him of the property. (Rev. & Tax. Code, §§ 6006, subd. (g)(5), and 6010, subd. (e)(5).)"

The effect of the exemption provided in Revenue and Taxation Code section 6006, subdivision (g)(5), is to afford the lessor of personal property (leased in substantially the same form as acquired by him) an option whereby the incidence of use tax upon the lease rentals may be diminished in effect by prepayment of the lesser sales or use tax which would have been applicable on account of the lessor's original purchase and storage if the property has not been acquired and stored for resale. (Cf. Rev. & Tax. Code, §§ 6007, 6008.)

In *Action Trailer Sales, Inc. v. State Bd. of Equal.,* 54 Cal.App.3d 125 [126 Cal.Rptr. 339], this court validated Regulation 1660 (c)(2) of defendant board requiring the lessor to make a timely exercise of the option. In so doing, we stated (54 Cal.App.3d at pp. 131-132):

"Revenue and Taxation Code section 6006, subdivision (g)(5), allows a lessor of tangible personal property leased in substantially the same form as acquired to pay sales tax reimbursement

pursuant to section 6052 or use tax measured by the purchase price of the property if the lessor desires to do so rather than to collect sales tax from his lessee. . . .

". . . . . .

"The option of paying sales tax reimbursement pursuant to section 6052 by definition must be exercised with respect to the original acquisition of the property by the lessor by paying sales tax to the transferor of the property. The next option is that of paying use tax measured by the purchase price of the property. . . .

". . . . . .

"The two options embodied in section 6006, subdivision (g)(5), which take a lease out of the category of a sale are couched in the past tense. If the lessor has failed to either pay sales tax reimbursement to the transferor at the time of the transfer of the property or has not timely reported and paid use tax based on the purchase price of the property at the time the property is first placed in rental service, the lease of the property is considered a sale and the lessor is either required to collect use tax from the lessee of the property or pay the amount he should have so collected."

It is apparent from the foregoing that the taxable event is the creation of the lessee's use, and that the primary tax is the use tax upon such lessee's use, measured by the rental receipts. So far as there is any tax payable in lieu of another tax, the sales or use tax measured by the purchase price of the lessor's original purchase is the substitute tax which a lessor may at his option make applicable if timely action is taken by him. In the absence of such timely exercise of the option, the primary tax remains payable. It does not thereby become a tax payable in lieu of the sales and use taxes.

Plaintiff's argument that it should not be required to pay a sales or use tax not legally enforceable against it in order to achieve such benefit overlooks the fact that no lessor who has purchased for resale by leasing is obligated to pay either sales or use tax on account of the original purchase or his storage prior to leasing. Normal operation of the options afforded by section 6006, subdivision (g)(5), is that the lessor pays the lesser tax which was not obligatory in order to avoid the use tax upon the lessee's use based upon the full lease rental.

We, therefore, conclude that even if Stables' original purchase of the livestock and equipment from the trustee in bankruptcy and its use thereof prior to leasing was exempt under the rule stated in the *Goggin* cases, that circumstance would not require exemption from the use tax upon the lessee's use.

The judgment is affirmed.

Ford, P.J., and Allport, J., concurred.

Snow Summit
Phone (714) 866-5766
P.O. Box 77, Big Bear Lake,
California 92315

02/17/1986

State Board of Equalization
Department of Business Taxes
Post Office Box 1799
Sacramento, Ca 95808

RE: Account No. SRDH23-742930

Gentlemen:

Pursuant to your letter dated January 27, 1986, Sierra Summit, Inc. petitions for a redetermination on the sales tax owed as a result of lease receipts of equipment from the sale of China Peak Resort, Ltd. Also, Sierra Summit, Inc. would like an informal hearing on the above matter with a hearing officer at the nearest District office of the Board of Equalization.

Sierra Summit, Inc. disagrees with the finding of the sales tax audit on the lease of skis purchased from China Peak Resort, Ltd. The sales tax on the lease receipts are not applicable for the following reasons.

(1) The Judgment filed in the United States Bankruptcy Court July 27, 1983 paragraph 3 states the following.

"Defendant, California State Board of Equalization, its representatives, agents and employees hereby are permanently restrained and enjoined from commencing or continuing *any act* to impose, determine, assess or enforce a sales or *other tax* against the said receiver, debtor, its principals or *other parties* by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation pursuant to the agreement of purchase . . ."

(2) The auditor based the sales tax on the regulations that state lease receipts are taxable where the lessor has not paid the sales or use tax on the purchase of the leased tangible personal property. However, this is not applicable because the term "lease"

is defined to *exclude* the use of tangible personal property for *less than one day* for a charge of *less than $20*, where the *use of the property is restricted to the business location of the seller.* The rentals of skis are restricted to the business premises of Sierra Summit, Inc., is less than one day, and the charge is substantially below $20.

If the above grounds for rescinding the sales tax on the lease receipts are acceptable then a meeting is not required.

Very truly yours,

/s/ ROBERT TARRAS
Robert Tarras
Controller
Sierra Summit, Inc.
Enclosures

David Ray Jenkins, #95310
Fullerton, Lang, Richert & Patch, P.C.
Post Office Box 55555
Fresno, California 93747
(209) 252-3600
7920/mko

Attorneys for Sierra Summit, Inc.

In the United States Bankruptcy Court
Eastern District of California

No. 180-01352 Chapter 11

In the Matter of
China Peak Resort, a limited partnership,
Debtor.

Brief in Support of Contempt Citation

I

INTRODUCTION

This dispute arises over the propriety of a field audit report purporting to find a tax due from Sierra Summit, Inc. ("Sierra Summit") to the State of California, State Board of Equalization ("Board") in light of a judgment entered by the above-entitled court enjoining the imposition of certain taxes. As is amply demonstrated herein, the tax assessment violates the judgment. Accordingly, a contempt citation should issue.

II

FACTS

Filed concurrently herewith is an "Appendix of Exhibits to Brief in Support of Contempt Citation" containing true copies of the following:

A. Judgment entered July 27, 1983 in *Ford v. State Board of Equalization* ("Judgment");

B. Field Audit Report dated December 19, 1985 ("audit report"); and

C. Agreement for Purchase and Sale and Escrow Instructions ("Agreement").

In the late 1970's China Peak Resort, a California limited partnership, was formed with Thomas Harris, Jr. and Gary G. Bagdasarian as general partners, and Dorothy Schwartz (Rojas) and/or DOT Investment Corporation as limited partners. The partnership purchased the assets of the China Peak Ski Area and commenced operation of a ski resort.

On September 19, 1978 a lawsuit entitled *Dorothy Schwartz, et al. v. Thomas W. Harris, Jr., et al.*, was filed in the Fresno County Superior Court (action number 233601-4, hereinafter referred to as "the state court action") seeking dissolution of the limited partnership, damages and other relief.

On October 11, 1978 an Order was entered in the state court action appointing Richard T. Ford as Receiver, to take possession of the assets of the limited partnership and operate the ski resort business. On August 4, 1980 the limited partnership filed a petition for relief under Title 11 Chapter 11 United States Code thereby commencing the above-entitled Chapter 11 case. On August 7, 1980, Dorothy Rojas filed a motion to dismiss the above-entitled Chapter 11 case, and, a Complaint seeking relief from the automatic stay to pursue the state court action. The hearings on such matters were continued to and held on September 2, 1980 and resulted in a stipulation providing, generally, as follows:

(a) For modification of the automatic stay to allow the state court action to proceed;

(b) For authorization of Richard T. Ford, Receiver of China Peak Resort, Ltd., to remain in possession of the debtor's assets "subject to such supervision by the United States Bankruptcy Court as is allowed by the Bankruptcy Reform Act of 1978 until such time as further order is entered by the United States Bankruptcy Court"; and

(c) For the authorization of such Receiver to commence efforts to sell the ski resort assets provided that "any sale shall be consummated pursuant to the terms of the Bankruptcy Reform Act of 1978".

Richard Ford, as Receiver, and as and for the debtor-in-possession in the Chapter 11 case continued operation of the ski resort. The Receiver also commenced an adversary proceeding in the Chapter 11 case against Union Bank of Bavaria and United Packing Company (adversary proceeding number 180-0322) re certain disputed claims. Apparently, the Receiver's authority to act for and as the debtor-in-possession was challenged in that case. The Findings of Fact and Conclusions of Law and Judgment in that adversary proceeding confirmed the Receiver's authority to act for the debtor-in-possession and authorized a sale of the assets of the debtor free and clear of any interests of those Defendants.

On September 1, 1981, negotiations for the sale of all of the assets of China Peak Resort were commenced between the Receiver and Snow Summit Ski Corporation. These negotiations resulted in the execution of the Agreement. The Agreement was conditioned upon approval of the United States Bankruptcy Court in the above-entitled case, was duly returned for approval, and an Order Confirming Sale was entered on December 16, 1981.

Although the Agreement names "Snow Summit Ski Corporation" as "buyer" Section 2.09(a) (page 9) specifically required the sellers to execute a Bill of Sale conveying to "Sierra Summit, Inc., a wholly owned subsidiary of buyer, all of the property and assets" of China Peak Resort. Thus, Sierra Summit, Inc., the Applicant herein, was the original transferee from the debtor-in-possession. The subject property has not been subsequently transferred to Sierra Summit by an intervening transferor as was suggested by the Board's counsel at oral argument.

The Board previously sought to assess a sales tax against the debtor-in-possession based on the sale consummated by the Agreement. The debtor-in-possession responded to that attempt by commencing the adversary proceeding which resulted in the Judgment.

III

LAW

A. "Whether the phrasing of the law imposes a liability directly upon the trustee to pay a sales tax or indirectly places the burden upon the trustee by naming the imposition a use tax, which the purchaser at a liquidating sale must pay, the net effect is identical. The rationale of the opinions [in the 9th Circuit] . . . is that any impost upon the essential liquidation process of the Bankruptcy Court is void. This has been the consistent policy and holding of [the 9th Circuit Court of Appeals]. . . . Here the Board is really presenting another argument which might have been made in the previous case. In practice, if the sales tax were levied upon the trustee, he would necessarily have passed the tax on to the purchaser. The same result is obtained by taxing the purchaser and requiring the trustee to collect or collecting the impost from the purchaser. All these devices are proscribed as to liquidating sales in bankruptcy. Whatever protean forms of a statute may be, or whatever subtle ingenuity of legislative tax advisors may suggest now or in the future, the tax is in fact based upon the sale; the sale is for the essential purpose of liquidating; the liquidation process was burdened thereby. The paramount authority in the bankruptcy field can be limited only by Congress. But, since Congress has already designated sales in the course of operation of a business as the sole area where the state is permitted to impose a tax of any type, essential sales in liquidation are inevitably free from such imposition." *State Board of Equalization v. Goggin*, (C.A. 9th, 1957) 245 Fed.2d 44, 45-46. "*Goggin II*".

B. Under state law, where a taxpayer purchases tangible personal property to be leased in substantially the same form, and subject to certain exemptions, the state can collect a sales tax based on income received from subsequent rental of the tangible personal property *only if* "the lessor has failed to either pay sales tax reimbursement to the transferor at the time of the transfer of the property or has not timely reported and paid use tax based on the purchase price of the property at the time the property is first placed in rental service." *Debtor Reorganizers, Inc. v. State Board of Equalization*, (2d D.C.A., 1976) 58 C.A.3d 691, 699; 130

Cal.Rptr. 64. See also, California Revenue and Taxation Code Section 6006(g)(5).

IV

ARGUMENT

A. In this case, the Board takes the position that, although it is not entitled to tax a liquidation sale of tangible personal property, it can tax subsequent use of said property. At oral argument, the Board argued that the exemption provided for by federal law from the imposition of a sales tax at a liquidation sale should not prevent the state from taxing subsequent taxable uses of the property sold. In making such argument, the Board has conveniently ignored the fact that the subsequent use to which the subject property was put was taxable under state law *only* because no sales tax was paid at the time of the purchase of the subject property. To allow the Board to impose such a tax would clearly violate the language quoted above from *Goggin II*. To paraphrase the *Goggin II* court "the same result is obtained by taxing the purchaser and requiring the trustee to collect, by collecting the impost from the purchaser, or by taxing the purchaser's subsequent use of the property purchased. All these devices are proscribed as to liquidating sales in bankruptcy." See *Goggin II*, 245 F.2d at 45.

B. The Board was previously enjoined, by the Judgment, "from commencing or continuing any act to impose, determine, assess or enforce a sales or other tax against the said Receiver, debtor, its principals or other parties *by reason of the sale* "... pursuant to the Agreement. An attempt to assess a tax which is assessable, under state law, only because no tax was paid at the time of the sale of said property can only be construed as an attempt to assert and collect a tax "by reason" of such sale. Accordingly, the Board's audit report constitutes a violation of the Judgment in that it purports to assess a tax based on the use of the property purchased pursuant to the Agreement.

C. In light of the Board's apparent reliance on *Debtor Reorganizers, Inc. v. The State Board of Equalization*, it could be argued that no wilful violation of the Judgment has occurred. Any

reliance upon the *Debtor Reorganizers, Inc.* case, however, was clearly erroneous since the issue of the extent to which a state can tax a sale by a bankruptcy debtor-in-possession is obviously one of federal not state law. Further, the *Debtor Reorganizers, Inc.* case was published in 1976—seven years before the Judgment. "Here the Board is really presenting another argument which might have been made in the [adversary proceeding] wherein the judgment was issued. C.F. *Goggin II*, 245 F.2d at 45. The Board, not Sierra Summit, should bear the cost of its erroneous legal analysis. The Board should be ordered to pay, as a sanction for its contumacious conduct, Sierra Summit's costs incurred as a result of the audit and tax assessment. Such costs can be later determined by allowing Sierra Summit to file and serve a "Bill of Costs" to which the Board will have a reasonable opportunity to object.

Even if the court is unwilling to award Sierra Summit all its costs herein incurred, it should, at a minimum, find the Board in contempt and award nominal damages. By so doing, the court can lay a foundation for more severe penalties if the Board does not take heed.

V

CONCLUSION

The above-entitled court is being asked by the Board to condone the evisceration of the principal—well established in the 9th Circuit—that the state cannot impose *any* tax which would directly or indirectly impede the liquidation process. The court must not do so. Its prior Judgment was no broader than it should have been. The Board had clearly violated said Judgment and a contempt citation should issue together with a Judgment for contempt sanctions in an appropriate amount.

Dated: March 19, 1986.

Respectfully submitted,

FULLERTON, LANG, RICHERT & PATCH, P.C.

By /s/ DAVID RAY JENKINS
David Ray Jenkins, Attorneys
for Sierra Summit, Inc.

John K. Van De Kamp, Attorney General
of the State of California
Edward P. Hollingshead
Supervising Deputy Attorney General
Derry L. Knight
Deputy Attorney General
1515 K Street
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5155

Attorneys for State Board of
Equalization

In the United States Bankruptcy Court
Eastern District of California
No. 180-01352 Chapter 11

In the Matter of
China Peak Resort, a limited partnership,
Debtor.

Reply Brief by State Board of Equalization
Re Order to Show Cause Re Civil Contempt
[Filed March 27, 1986]

This brief is filed, pursuant to the court's briefing schedule set March 5, 1986, in reply to the "Brief in Support of Contempt Citation" filed herein by attorneys for Sierra Summit, Inc. ("Sierra Summit"). By previous response, filed March 5, 1986, the State Board of Equalization ("Board") pointed out that this Court's July 27, 1983 judgment in no way involved, much less resolved, the applicability of the California Sales and Use Tax to *uses made by the purchaser* of property previously purchased from debtor's estate. The use taxes in issue relate to rentals by non-debtor Sierra Summit of ski equipment which was purchased from debtor China Peak. The tax in issue in no way relates to the sale from China Peak to Sierra Summit, and certainly therefore does not impede the China Peak liquidation process.

As more fully detailed below, it is firmly established by California law that the primary tax in the case of such rentals is the use

tax based upon rental receipts. Such state court construction of California's tax laws are, of course, binding upon federal courts. Sierra Summit's reference to *Goggin II* is wholly misplaced since that case dealt with imposition of a use tax based upon the *purchase* of the property *from the debtor*. Here, the taxable event is a *subsequent use* by the purchaser, and is in no way related to the purchase such as was involved in *Goggin II*.

IMPOSING A TAX ON SUBSEQUENT TAXABLE USES OF PROPERTY WHICH WAS PURCHASED FROM A DEBTOR IN NO WAY IMPEDES THE LIQUIDATION PROCESS

Non-debtor Sierra Summit's sole connection with debtor China Peak Resort was by virtue of the fact that China Peak sold Sierra Summit certain ski equipment, in a sale which this Court concluded was a "liquidation sale" for purposes of the Sales and Use Tax. Subsequent to the purchase, Sierra Summit has made certain uses of the property which, under California law, are taxable uses. Under California law, rentals of certain personal property are considered "sales" for purposes of the sales and use tax law, thus resulting in the imposition of a use tax. Thus, the use tax based upon rental receipts is simply another application of the Sales and Use Tax law to a specific transaction. Just as Sierra Summit would have been subject to the sales tax had it chosen to sell the ski equipment purchased, it is subject to a use tax based upon its rentals of equipment, the taxable event.

Sierra Summit ignores the separate nature, and total separateness of the tax at issue, arguing that somehow the tax is impeding the liquidation process. Clearly it is not. Sierra Summit is attempting to obtain a tax benefit which its competitors do not have, and to which it clearly is not entitled.

Sierra Summit ignores the state court's construction of the subject tax, and attempts to find a connection with a bankruptcy sale by referring to an available election by a purchaser to utilize the purchase price of the property as the measure for the use tax. However, Sierra Summit ignores the fact that state courts have repeatedly concluded that the *taxable event* in such instances is

when the lessor first leases the property. The taxable event is *not* the purchase.

Indeed, had Sierra Summit chosen not to lease the subject property in substantially the same form as purchased, there would have been no taxable event, and no tax. It was only because Sierra Summit chose to make uses of the property which were "taxable uses" that the dispute arose.

In short, "the taxable event is the use of the property . . ." (*Union Oil Co. v. State Bd. of Equal.* (19) 60 Cal.2d 441, 446-447; *Action Trailer Sales, Inc. v. State Board of Equalization* (1975) 55 Cal.App.3d 125, 131-132; see also *Debtor re Organizors, Inc. v. State Bd. of Equalization* (1976) 58 Cal.App.3d 691, 698.) Such state court constructions of California's tax laws are, of course, binding upon the federal courts. (*Richfield Oil Corp. v. State Board of Equalization* (1946) 329 U.S. 69.)

GOGGIN II IN NO WAY RESTRICTS IMPOSITION OF TAX ON TAXABLE USES OF PROPERTY AFTER A PURCHASE FROM A DEBTOR

Sierra Summit places its reliance upon *State Board of Equalization v. Goggin* (9th Cir. 1957) 245 Fed.2d 44 ("*Goggin II*"). Such reliance is wholly misplaced, since *Goggin II* simply dealt with the question of whether or not a use tax could be imposed upon the buyer of property as a result of the *purchase from a debtor*. *Goggin II* simply held that since a sales tax could not be imposed upon the debtor-seller (*California State Board of Equalization v. Goggin* (9th Cir. 1951) 191 Fed.2d 726, cert. den. (1952) 342 U.S. 909 ["*Goggin I*"]), a use tax *based on that same transaction* likewise could not be imposed. The *Goggin* decisions in no way restricted the imposition of otherwise applicable taxes to transactions by the purchaser of the property after the initial purchase from the debtor.

In *Goggin I*, the bankrupt had been adjudicated and an order issued for the total liquidation of the business (191 Fed.2d at 727). Because of this status, the 9th Circuit concluded that in proceeding with the liquidation sale, the trustee was not "conducting any business." Accordingly, the court found 28 United States Code section 960 (which requires debtors conducting

business to pay tax as any other non-debtor does) inapplicable. *Goggin I* then concluded that the sales tax was inapplicable to the post-adjudication court ordered total liquidation. The court's language is instructive:

> "... the fact that the tax has been held applicable [under state law] does not alter the fact that when the trustee in bankruptcy disposed of the trucks here involved '... the sale was not made in the course of conducting a business but in the process of putting an end to a business.'" (*Goggin I* at p. 729.)

Goggin II, concerning application of the use tax rather than sales tax, involved a fact "situation [that] was identical" to *Goggin I*. (Goggin II at p. 45.) The *Goggin II* court emphasized that it was the interference with the "essential liquidation process" that posed the problem. (*Goggin II* at pp. 45, 46.)

Here, the tax in issue is a tax based on *rentals* of the property *by the purchaser* Sierra Summit. By no stretch of the imagination can such subsequent taxable use be considered an interference with the bankruptcy court's attempts to liquidate China Peak's business. The references to the *Goggin* decisions are wholly misplaced.

CONCLUSION

For the reasons detailed in the response filed March 5, 1986, and this reply memorandum, it is respectfully requested that the court issue an order dissolving the order to show cause previously issued herein on February 19, 1986. Neither this Court's previous judgment in the debtor proceeding nor the *Goggin* decisions in any way restrict the state from imposing otherwise applicable sales and use taxes upon an entity which happened to purchase the subject equipment from a debtor in bankruptcy.

DATED: March 25, 1986

Respectfully submitted,

John K. Van De Kamp
Attorney General

Edward D. Hollingshead
Supervising Deputy Attorney General

By /s/ DERRY L. KNIGHT
Derry L. Knight
Deputy Attorney General

Attorneys for State Board of Equalization

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
JAN 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-681

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

VS.

SIERRA SUMMIT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

JOHN K. VAN DE KAMP
Attorney General of
the State of California
ROBERT F. TYLER*
Supervising Deputy
Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5155
Attorneys for Petitioner
California State Board
of Equalization

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH S. . • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Consistent with the Tenth Amendment, does property purchased at a bankruptcy liquidation sale enjoy an immunity from non-discriminatory state sales and use taxes, both at the time of transfer and while thereafter utilized in the purchaser's normal course of business?

2. Does a bankruptcy court have jurisdiction, the State Anti-Tax Injunction Act (Title 28 U.S.C. section 1341) notwithstanding, to enter an order barring the imposition of state taxes against a person who is neither a debtor nor court officer in any presently pending bankruptcy proceeding?

LIST OF PARTIES

The debtor in the original bankruptcy proceeding was China Peak Resort. Richard T. Ford was both the receiver in the State Court proceedings which preceded and underlay China Peak's bankruptcy filing, and the appointed trustee in the China Peak bankruptcy itself.

As part of the concurrent and inter-related state court receivership and bankruptcy proceedings, the sale of debtor China Peak's assets was effected to Snow Summit, Inc., a California corporation, who, in turn, delegated its rights to said property to its newly created wholly owned subsidiary, Sierra Summit, Inc., respondent herein.

Following this sale, Richard T. Ford, as Trustee in the Bankruptcy estate, brought the adversary proceeding against petitioner California State Board of Equalization whose judgment forms the basis for the contempt citation at issue herein.

Neither trustee/receiver Ford nor purchaser Snow Summit, Inc. was a party to any of the present contempt proceedings, as none of their rights, duties or obligations were thereby drawn into question. The sole parties to the contempt citation underlying the present proceeding were petitioner, California State Board of Equalization, and respondent, Sierra Summit, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Authorities Involved	2
Constitution of the United States	2
Federal Law and Authority	2
Statement of the Case and the Facts	4
Summary of Argument	10
I	
Argument	13
The Imposition by a State of a Non-Discriminatory "Use Tax" Upon the Purchaser of Property From a Bankruptcy Liquidation Sale Is Fully Consonant With the Congressional Exercise of Its Bankruptcy Powers, Violates None of the Implied Intergovernmental Tax Immunities of the Federal Government, and the Prohibition Thereof Is Barred by the Tenth Amendment	13
A. 28 U.S.C. § 960 is an affirmation of the liability of bankruptcy estates for all applicable state taxes and is indicative of the general attitude of Congress in that regard. Moreover, even if silent in this area, that silence is certainly not properly construed as indicating a Congressional intent to exempt liquidation sale purchasers from "use tax" obligations	17
B. There is No Implied Constitutional Immunity From a State's Taxation of the "Use" of Property Purchased from a Bankruptcy Liquidation Sale	18
C. Applying the Goggin II rationale to the facts of this case yields an absurd result	24
D. Conclusion	25

TABLE OF CONTENTS

Page

II

A Bankruptcy Court Lacks Jurisdiction to Interfere With and Enjoin the Efforts of a State to Assess and Collect an Otherwise Valid State Tax Imposed Against a Person, Not a Party to a Bankruptcy Proceeding, Where That Tax Concerns Uses of Property Subsequent to Its Passage from the Bankruptcy Estate 25

Conclusion 32

TABLE OF AUTHORITIES CITED

Cases

Page

Alabama v. King & Boozer, 314 U.S. 1 (1941) 18, 19

American Airlines, Inc. v. State Board of Equalization, 216 Cal.App.2d 180, 30 Cal.Rptr. 590 (1963) 21

Baker & Taylor Drilling Co. v. Stafford, 369 F.2d 552 (9th Cir., 1966) 26

Bank of America National Trust & Savings Assoc. v. State Board of Equalization, 209 Cal.App.2d 780, 26 Cal.Rptr. 348 (1962) 21

Bland v. McHann, 463 F.2d 21 (5th Cir., 1972), *cert. den.* 410 U.S. 966 (1973) 30

Board of Equalization v. Goggin 245 F.2d 44 (9th Cir., 1957) ..... *passim*

California v. Grace Brethren, 457 U.S. 393 (1982) 30

California State Board of Equalization v. Goggin, 191 F.2d 726 (9th Cir., 1951) 13

City of Detroit v. Murray Corporation, 355 U.S. 489 (1958) 22

Debtor Reorganizers, Inc. v. Board of Equalization 58 Cal.App.3d 691, 130 Cal.Rptr. 64 (1976) 9, 30

Evarts v. Eloy Gin Corp., 204 F.2d 712 (9th Cir., 1953), *cert. den.* 346 U.S. 876, 74 S.Ct. 129, 98 L.Ed. 384 (1953) 26

Fair Assessment in Real Estate Association, Inc. v. McNary, 454 U.S. 100 (1981) 14, 30, 31

Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir., 1955) .. 31

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 15

Graves v. New York *ex rel* O'Keefe, 306 U.S. 466, 483 (1939) 19, 23

Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) 14

Hoyt v. Sears, 130 F.2d 636 (9th Cir., 1942), *cert. den.*, 317 U.S. 687 (1943) 29

Table of Authorities Cited

Cases

Page

In re Chicago, Rock Island and Pacific Railroad Co., 794 F.2d 1182 (7th Cir. 1986) 26
In re Idaho Agriquipment, 54 B.R. 114 (Bky., Idaho, 1985) 27
In re Los Angeles Lumber Products Co., 45 F.Supp. 77 (S.D. Ca., Central Div., 1942) 20, 21
In re Penn Central Transportation Co., 325 F.Supp. 294, 298 (E.D. Pa., 1970) 17
In re Shirley Duke Associates, 611 F.2d 15 (2d Cir., 1979) 26
In re Xonics, Inc., 813 F.2d 127 (7th Cir., 1987) 26, 29
James v. Dravo Construction Co., 302 U.S. 134 (1937) .. 14, 19
Los Angeles Police Protective League v. City of Los Angeles, 163 Cal.App.3d 1141 209 Cal.Rptr. 890 (1985) ... 30, 31
Massachusetts v. United States, 435 U.S. 453 (1978) 15
Mayo v. United States, 319 U.S. 441 (1943) 19
McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) .. 20
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 18
Michigan v. Michigan Trust Co. (1932) 286 U.S. 334 6
Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 27
Palmer v. Webster & Atlas National Bank, 312 U.S. 156 (1941) 17, 22
Penn Dairies v. Milk Control Commission, 318 U.S. 261 (1943) 18, 23, 24
Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. ____, 96 L.Ed.2d 152 (1987) 24
Rosewell v. LaSalle National Bank, 450 U.S. 503 (1986) 14, 30
Shamrock Oil Corp. v. Sheets, 313 U.S. 100 (1941) 29
Swarts v. Hammer, 194 U.S. 441 (1904) 15, 21
United States v. City of Detroit, 355 U.S. 466 (1958) 19, 20, 22

Table of Authorities Cited

Cases

Page

United States v. County of Fresno, 429 U.S. 452 (1977) 19, 20, 22
United States v. New Mexico, 455 U.S. 720 (1982) 18, 19, 21, 22
United States v. Sampsell, 266 F.2d 631 (9th Cir., 1959) .. 17
United States v. Thompson, 319 F.2d 665 (2d Cir., 1963) .. 31
United States v. United Mine Workers of America, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947) 31
Washington v. United States, 460 U.S. 536 (1983) 18, 20, 22
West v. Oklahoma Tax Commission, 334 U.S. 717 22
Younger v. Harris, 401 U.S. 37, 44 (1971) 14

Constitution

U.S. Constitution:
Amendment X 2, 14, 28, 29
Article I, section 8 ..... 2, 29

Statutes

California Revenue and Taxation Code:
§ 6009 20
§ 6019 20
§ 6201 20
§ 6202 20
§ 6203 ..... 9, 23
§ 6205 21
§ 6241 20

18 California Administrative Code (Sales and Use Tax Regulations) § 1660(c)(3) 21

TABLE OF AUTHORITIES CITED

STATUTES

	Page
P.L. 98-353, (1984) U.S. Code Congressional and Administrative News, No. 3, pages 602-604	28
11 U.S.C.:	
Section 105	2, 9, 25, 29
Section 346	18
Section 728	17
28 U.S.C.:	
Section 157	26
Section 157(b)	8, 9
Section 158(b)	8, 9
Section 960	*passim*
Section 1254(1)	1
Section 1334	3
Section 1334(c)(2)	28
Section 1341	*passim*

Text

Note: "State Taxation of Bankruptcy Liquidations: Federalism Misconceived", 67 Yale L.J. 335 (1957) at 338-339 16

No. 88-681

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

VS.

SIERRA SUMMIT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, Pet. Cert., Appendix A is reported at 847 F.2d 570.

The opinion of the Bankruptcy Appellate Panel (hereinafter "BAP") of the Ninth Circuit Court of Appeals, Pet. Cert., Appendix B is reported at 76 B.R. 757.

The opinion of the United States Bankruptcy Court for the Eastern District of California, Petition for Certiorari (hereinafter, "P.C.") , Appendix C, is unreported.

JURISDICTION

Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. section 1254(1). The judgment of the United States

Court of Appeals for the Ninth Circuit was entered and filed May 25, 1988. A petition for rehearing and suggestion for rehearing *en banc* was timely filed on June 9, 1988. Said petition for rehearing was denied on July 22, 1988. Petitioner timely filed its Petition for Writ of Certiorari within ninety days of that date, i.e. on October 17, 1988. This Court granted certiorari on December 12, 1988.

CONSTITUTIONAL AND STATUTORY AUTHORITIES INVOLVED

Constitution of the United States

Article I, section 8, the Enumerated Powers of Congress, provides in clause 4 that Congress shall have the power:

> "To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

Amendment X to the Constitution provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Federal Law and Authority

Title 28 U.S.C. Section 1341, the State Anti-Tax Injunction Act provides that:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Title 28 U.S.C. Section 960 provides that:

> "Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

Section 105 of the Bankruptcy Code (Title 11 U.S.C.) provides in pertinent part that:

> "(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.
>
> (b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.
>
> (c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation."

Title 28 U.S.C. section 157 appears in Appendix A.

Title 28 U.S.C. section 1334 provides as follows:

> "(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> "(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not rising in a case under title 11

or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

"(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

The pertinent California statutes and administrative regulation defining its use tax, its incidence and exaction, and the basis upon which that tax was exacted upon respondent herein appear in Appendix B.

STATEMENT OF THE CASE AND THE FACTS

During the late 1970's China Peak Resort, a California limited partnership, was formed between certain individuals, and thereafter commenced operations of the China Peak Ski area. J.A., page 5 (Finding of Fact #1). On September 9, 1978 China Peak Resort's limited partners sued the general partners in the California state courts, for dissolution of the limited partnership, damages, and other relief. J.A., page 5 (Finding of Fact #2). On October 11, 1978, the California court therein appointed Richard T. Ford as receiver, to take possession of China Peak's assets and operate its ski resort business. J. A., page 6 (Finding of Fact #3).

On August 4, 1980, while the state court proceedings were still pending, the limited partnership, China Peak Resort ("China Peak"), itself filed for relief under Chapter XI of the Bankruptcy Code (Title 11 U.S.C.). J.A., page 6 (Finding of Fact #4). Immediately following this filing, the State plaintiff filed alternative motions either to dismiss the bankruptcy proceedings or for

relief from the automatic stay to allow her to independently pursue the state court action. These motions eventuated in a stipulation between the parties, approved by the Bankruptcy Court on September 15, 1980, which provided that: Mr. Ford would become, as state court receiver, the debtor-in-possession in the bankruptcy proceedings; that the state court proceedings would proceed to final resolution; and, that Mr. Ford would endeavor to sell the debtor's assets within the context of the bankruptcy proceedings. J.A., page 6 (Finding of Fact #5).

On September 3, 1981, judgment was entered in the state court proceedings, holding that, subject to the jurisdiction of the Bankruptcy Court, the assets of the debtor, China Peak, were held in constructive trust for the state court plaintiff, and that to the extent that the Bankruptcy Court did not so hold, the state court plaintiff had a perfected security interest in those same assets. J.A., pages 6-7 (Finding of Fact #7).

On September 1, 1981, negotiations for the sale of the entirety of the debtors' assets were begun between Mr. Ford and Snow Summit Ski Corporation (hereinafter "Snow Summit"). J.A., page 7 (Finding of Fact #8). These negotiations were successful, and on December 16, 1981, the Bankruptcy Court approved the sale of various of China Peak's assets to Snow Summit. J.A., page 7 (Finding of Fact #8).

Following completion of this transfer, China Peak dismissed its Bankruptcy Petition, with prejudice, on May 24, 1982.[1] J.A., pages 7-8 (Finding of Fact #9).

---

[1] This procedure is a variant of what is known under the Code as a "liquidating eleven", essentially an oxymoron, wherein a debtor liquidates its estate under a Plan of Reorganization, rather than a "straight" bankruptcy under Chapter VII. Here, of course, neither a ("liquidating") Plan of Reorganization nor Liquidation Order was ever filed. Liquidating 11's were unknown under the predecessor to the Code, the Bankruptcy Act, but since the Code's promulgation in 1978, have become relatively common. Most obviously, given both this possibility and the practice demonstrated by the facts of this case of a sale without benefit of a "liquidating" Plan or liquidation order, the question of whether a given entity is in "liquidation" is neither apparent from the

The California State Board of Equalization ("the Board") thereafter attempted to assess the debtor's principals and Mr. Ford, as state court receiver, for the sales taxes due upon the bankruptcy estate's sale of the debtor's assets to Snow Summit. The bankruptcy trustee filed a motion to reopen the bankruptcy case and, after same was granted, filed an adversary proceeding (U.S.B.C., E.D. Cal. Adv. No. 183-0344) on his own behalf and on behalf of the debtor, seeking to bar the assessment of that tax against them. J.A., page 8 (Finding of Fact #12); J.A., page 1.

After briefing by both parties (J.A., pages 28-38), judgment in the adversary proceeding was entered adversely to the Board on July 27, 1983, with the Bankruptcy Court finding that the December 16, 1981 sale "essentially constituted" a liquidation of the entirety of the China Peak estate, and thereupon determining that any tax upon such a sale was prohibited under *California State Board of Equalization v. Goggin* 245 F.2d 44 (9th Cir., 1957) (hereinafter referred to as "Goggin II"). J.A., page 6 (Conclusions of Law #3 &4); P.C., App. F, A-27. By its terms, this judgment held that "[n]either Mr. Ford, as receiver of the debtor, nor the debtor, nor its principals (nor any person or entity indemnifying said persons), have or are subject to any liability to [the Board] for sales or other tax by reason of the sale", and prohibited the Board from "assess[ing] or enforc[ing] a sales or other tax against the [trustee], China Peak, its principals or other parties by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit . . .". P.C., App. F, A-27.

Chapter the proceedings are filed under, nor (given the presence of "debtors-in-possession", as opposed to a trustee appointed by the bankruptcy court) by who conducts them. Such a practice also raises the conundrum of ascertaining just when a Chapter 11 filing, definitionally for a reorganization for a continuance of business, becomes a liquidation. Compare, *Michigan v. Michigan Trust Co.* (1932) 286 U.S. 334, 345 (franchise taxes applicable to conduct of business by federal receiver due and payable even though arising upon liquidation sale because receivership liable for taxes accruing during administration, proceeding was filed as a receivership and retained characteristics as such through liquidation sale).

After it received China Peak's equipment and physical plant through and under the 1981 sale, Sierra Summit, a wholly owned California subsidiary of Snow Summit, began commercial operations, which as relevant herein, included renting the ski equipment it had received under the bankruptcy sale to its (Sierra Summit's) customers. J.A., page 29.

In December of 1985, the Board rendered a field audit of Sierra Summit's business operations for the period November 10, 1982 through September 30, 1985, finding that Sierra Summit had understated its taxable income for that period: a portion of this discrepancy was attributable to Sierra Summit's failure to declare and remit use taxes collected from its customers on the rentals of the ski equipment it had received ex-tax through the bankruptcy estate and Snow Summit. P.C., App. F, A-25 and Exhibit B thereto, A-29.[2] In February of 1986, Sierra Summit demanded that the Board immediately refrain from any further pursuit of this audit,[3] stating that the taxes in question were barred by July

---

[2] The deleted Exhibit B found on that page was a hard copy of the hand written work papers and findings prepared by Board staff relative to their over-all audit of respondent's operations for the period in question. As noted in the Petition's Appendix at A-29, it was impossible to reproduce same due to their unreadability (much of the document consisted of scrawled figures). The Ninth Circuit apparently accepted that more taxes were restrained by these proceedings than those falling under Goggin II, as demonstrated by its closing language concerning the contempt lying against "only" as to the assessment based on the ski rentals. P.C., Appendix A, at A-4. A somewhat legible xerographic copy of this document is found beginning at page 8 of the Appellant's Excerpts of the Record filed with the Ninth Circuit.

[3] The taxes arguably violating Goggin II were only a portion of those determined by the audit which triggered these events. P.C., Appendix F (Exhibit B thereof), A-29 (as was already noted previously, same is unreadable, but see f.n. 2, supra). However, due to the instant proceedings, *all* collection activities have been placed in abeyance, including those as to taxes not even arguably falling within Goggin II's proscription. While the Ninth Circuit stated in conclusion that it assumed that the bankruptcy court would hold the Board in contempt "only" for that portion of the audit arising from the use tax on the ski rentals, the point

23, 1983 judgment in the Bankruptcy Court Adversary Proceeding. P.C., App. F, A-29. The Board refused, responding that its actions did not violate that Judgment and that, if dissatisfied, Sierra Summit should pursue its available California remedies. P.C., App. F, A-31.

On February 19, 1985, after again reopening the underlying bankruptcy proceedings, Sierra Summit filed an Order to Show Cause re Contempt with the Bankruptcy Court alleging the above, and contending that the Board's assessment of these use taxes constituted a violation of the Court's Adversary Judgment. P.C., App. F, A-24.

The Board responded that: given the strictures of 28 U.S.C. section 1341, the Bankruptcy Court lacked jurisdiction of the matter; even if the Bankruptcy Court had jurisdiction, it should abstain from hearing it; and, even should the matter be properly heard on its merits, that the Board's actions violated neither the language nor intended reach of the prior judgment or Goggin II. J.A., pages 10-16; P.C., App. G, A-33.

The Bankruptcy Court issued its opinion on May 9, 1986, essentially adopting the Board's response on the jurisdictional and abstention issues, and remarking simply that the Board's actions did not violate its prior (adversary) judgment, for "[b]y restraining the imposition of a tax on the sale of the assets by the debtor, the Court did not restrain the imposition of a tax on the resale or rental of said assets by the purchaser." P.C., App. C, A-12.

Sierra Summit appealed to the Bankruptcy Appellate Panel, pursuant to Title 28 U.S.C. section 158(b), where in a majority decision, the Bankruptcy Court's ruling was reversed. The reasoning of that majority was simple: since California law would have exempted Sierra Summit's rental transactions from the use taxes in question except for the fact that no taxes had been paid on its acquisition of the skis from the bankruptcy estate, and since those taxes had not been paid because they were barred by Goggin II, the taxes in question were "based in fact upon the [liquidation]

remains that all collection activities on this "unrelated" portion of the audit have been forestalled for three years.

sale" and were therefore likewise barred by Goggin II. Additionally, it found extant bankruptcy jurisdiction under 11 U.S.C. § 105, the provisions of Title 28 U.S.C. section 1341 (the Anti-Tax Injunction Act) notwithstanding, in that the Bankruptcy Court had no discretion but, upon Sierra Summit's request, to determine the Board's compliance with its prior adversary judgment, and that the Bankruptcy Court should likewise not abstain from exercising that jurisdiction in that Sierra Summit had no available state remedy.[4] P.C., App. B, A-5.

The dissent, while finding that the Bankruptcy Court erred in declining to exercise jurisdiction over the controversy, argued that the imposition of use taxes on subsequent rentals of equipment purchased at a bankruptcy liquidation sale did not violate Goggin II in that the tax was not imposed against any of the parties in bankruptcy[5] and arose (and was measured) by events unrelated to the bankruptcy proceedings (i.e. the skiers rental "use" of the skis). P.C., App. B, A-10.

The Board appealed the Bankruptcy Appellate Panel decision to the Ninth Circuit Court of Appeals, pursuant to Title 28 U.S.C. sections 158(d) and 1291. On May 25, 1988 the Ninth Circuit issued its unanimous decision affirming the majority decision of the Bankruptcy Appellate Panel, and remanded the matter back to the Bankruptcy Court with instructions to issue the prayed-for contempt citation against the Board. The reasoning of the Circuit Court of Appeals generally followed that of the Bankruptcy Appellate Panel majority, with the exception that the

[4] California case law had already held that the Goggin II would not be expanded to the limits herein sought, i.e. to protect the purchaser at a liquidation sale from the duty to collect use taxes from its customers based on their "use" of same in subsequent rentals or leases of that same property. *Debtor Reorganizers, Inc. v. Board of Equalization* 58 Cal App 3d 691, 130 Cal.Rptr. 64 (1976).

[5] In fact the primary incidence of the tax was not even imposed against Sierra Summit, but instead its rental customers. Under California law, Sierra Summit had the duty to collect these taxes from its customers and remit them to the Board. California Revenue and Taxation Code section 6203.

Circuit Court of Appeals addressed the Board's contention that Goggin II was incorrectly decided and contrary to the holdings of various other circuits, by noting and rejecting those decisions, and by stating that it was free to follow its own line of reasoning in that this Supreme Court has accepted a certain regionalism in the administration of federal bankruptcy law in relation to state sales and use taxes. P.C., App. A, A-1. This conclusion was reiterated when the Board's direct attempt to gain reconsideration of Goggin II through a request for rehearing *en banc* was denied on July 22, 1988. P.C., Appendix D, A-14.

SUMMARY OF ARGUMENT

The essence of federalism is that the States have certain legitimate interests that the national government is bound to respect, even though its laws are supreme. Paramount among these interests is the power to tax, for such provides the bulk of the revenues which are the lifeblood of the States themselves. That power should be circumscribed by the federal government only where necessary and appropriate to do so, and then only in a fashion which most minimally impedes the State taxing power.

The decision of the Circuit Court violates these principles in two ways. First, it creates a bar to the efforts of a State to exercise its sovereign power of taxation which is neither consistent with the intent of Congress nor constitutionally mandated. Second, it impermissibly extends bankruptcy jurisdiction beyond its Congressional grant, thereby violating the right of the state judiciaries to adjudicate questions of state law, as guaranteed by the Tenth Amendment.

In the bankruptcy context, the general rule is that, absent direct prohibition from Congress, all property in the estate is taxable. Instead of prohibiting applicable state taxes from being exacted upon bankruptcy property and business, Congress has consistently recognized the need for property in, and the activities of a bankruptcy estate to bear their "fair share" of applicable taxes, so as to equalize their support for the States services they enjoy. This recognition has here specifically taken the form of 28 U.S.C. § 960, whose precepts are directly contrary to those contained in

the Ninth Circuit's Goggin II rule. In the decision here under review, the Ninth Circuit not only wrongly refused to recognize the permissive nature of § 960 in this context, but incorrectly construed § 960 to effect a broad and continuing bar to the collection of state taxes. Section 960 by its own terms bars no tax: the Ninth Circuit's construction completely frustrates both the Congressional intent underlying this statute and Congress' general attitude in this subject area.

Even if the use tax in this case were being imposed upon the liquidation sale purchaser, with the bankruptcy trustee being required to collect and remit same to the Board, there is no constitutional immunity extending to a bankruptcy liquidation sale purchaser for liability for the instant tax. Use taxes such as the one under consideration herein have long been recognized as a valid exercise of the States' power to tax.[6] They are constitutionally "non-discriminatory" in that they apply equally to all persons and entities possessing property throughout the State, and have the effect of equalizing the burden of state taxation thereon.

Such a use tax does not lie against the United States or any of its instrumentalities. Although the tax is, in many instances, a complement to a sales tax on the liquidation sale itself, the incidence of such a use tax is not upon the liquidation itself, but instead upon the private purchaser's subsequent rights of owner-

---

[6] Petitioner's argument (viz., Argument I, infra.) concerning the merits of a bar against state taxation of a liquidation sale purchaser's "use" of the property is aimed at demonstrating the fallacy of the Goggin II foundation for the Ninth Circuit's analysis. As noted below, the facts of this case are the *reductio ad absurdum* of the Goggin II analysis, for here the incidence of the tax is not even upon the liquidation sale purchaser, but instead upon later customers, whose "use" is that being taxed. See *Debtors Reorganizers, Inc. v. State Board of Equalization*, *supra* 58 Cal.App.3d at 699, 130 Cal.Rptr. at 69. Similarly, here the duty of collection is not upon the trustee, but instead upon the liquidation purchaser's subsidiary, as lessor. *Id.*, 58 Cal.App.3d at 697, 130 Cal.Rptr. at 68. .

Of course, the facts of this case are directly brought into issue by petitioner's Argument II, infra, concerning the jurisdiction of a bankruptcy court to adjudicate this controversy.

ship in the property acquired therein. That incidence is thus neither "on" nor "derivative to" the federal government.

Similarly, there would be only two possible burdens placed upon bankruptcy processes by the imposition of a use tax against a liquidation sale purchaser: the potential that the net economic benefit to the estate from the sale will be diminished in an amount proportional to the tax; and the fact that, under state law, a bankruptcy trustee will have the duty to collect the tax from the purchaser. Neither burden is of constitutional magnitude. A purely economic effect such as that potentially presented is but one of concomitants expected in our federal form of government and is not of itself a basis for barring an otherwise valid state tax. In like manner, the trustee's duty of collection of such tax is "minimal", obviously imposed for the obviously valid purpose of collecting a tax which would otherwise in many cases go uncollected, and is not of constitutional proportions.

Here, the Ninth Circuit takes its mistaken analysis in the area a step beyond Goggin II, for not even collection obligations are being imposed upon the trustee. There is no jurisdiction for a bankruptcy court to insinuate itself into the efforts of a state taxing agency to impose and collect taxes from a private person not a party to the bankruptcy itself, even where the subject of that taxation is property that was once in the bankruptcy estate. Bankruptcy jurisdiction is circumscribed by the basic purposes of bankruptcy law: adjudications necessary to determine the rights of the bankrupt; and, adjudications necessary to marshall and equitably distribute the debtor's estate, a concept expressed by Congress in its post-Marathon grant of "core" bankruptcy jurisdiction under 28 U.S.C. § 157. While bankruptcy courts are also authorized under § 157 to adjudicate controversies "related to" the bankruptcy estate, that jurisdictional grant does not extend to state law controversies between persons not parties to the bankruptcy itself. Moreover, even assuming that "related to" jurisdiction existed to adjudicate this controversy, such would be barred both by reason of the direct prohibition against such jurisdiction contained in the Anti-Tax Injunction Act (28 U.S.C. § 1341) and general principles of comity. Given that there is neither a Congressional grant of, nor Constitutional basis for the Bankruptcy

Court's jurisdiction over the instant controversy, the assumption of such by that court conflicts with the Constitution's Tenth Amendment protection afforded the sovereign powers of the state judiciaries to adjudicate questions of state law.

I

ARGUMENT

THE IMPOSITION BY A STATE OF A NON-DISCRIMINATORY "USE TAX" UPON THE PURCHASER OF PROPERTY FROM A BANKRUPTCY LIQUIDATION SALE IS FULLY CONSONANT WITH THE CONGRESSIONAL EXERCISE OF ITS BANKRUPTCY POWERS, VIOLATES NONE OF THE IMPLIED INTERGOVERNMENTAL TAX IMMUNITIES OF THE FEDERAL GOVERNMENT, AND THE PROHIBITION THEREOF IS BARRED BY THE TENTH AMENDMENT

Brought into issue in the instant proceedings is the validity of a ruling of the Ninth Circuit Court of Appeals, *California State Board of Equalization v. Goggin*, 245 F.2d 44 (9th Cir. 1957) (hereinafter "Goggin II"),[7] which held that a "use tax", measured by upon the value of the affected property, cannot be imposed upon a purchaser from a bankruptcy liquidation sale. As applied herein, the Ninth Circuit, by what it felt to be a compulsory extension of the Goggin II rationale, found that prohibition to bar the imposition of a use tax upon the rentals of that same property in commercial transactions between the purchaser's subsidiary, respondent Sierra Summit, and its customers occurring in the three years following the sale. The application of

---

[7] Not brought into issue herein is the question decided by Goggin I (*California State Board of Equalization v. Goggin*, 191 F.2d 726 (9th Cir., 1951), of whether a liquidation sale itself is directly taxable. While petitioner believes that a liquidation sale is itself directly taxable under 28 U.S.C. § 960, petitioner believes that it is not necessary for the Court to so decide to adjudicate the instant controversy. Petitioner would generally agree however, with the arguments advanced in contravention of the Goggin I rule within the "Brief of the National Governor's Association, *et al.*, as *amici curiae* in support of petitioner."

Goggin II to the facts of this case is a *reductio ad absurdum*, underscoring the basic invalidity of the Goggin II rationale. Goggin II itself stands in complete antithesis to the general precepts of our constitutional federal framework, is contrary to the obvious intent of Congress exercising its enumerated bankruptcy power, and violates this Court's clear directives as to the outer limitations of the constitutional doctrine of implied intergovernmental immunity. Given such, Goggin II clearly violates the sovereign powers guaranteed the States under the Tenth Amendment.

In order to dispose of the Ninth Circuit's analysis in the current case, one should first examine the validity of the Ninth Circuit's rule under the Goggin II facts, i.e. where the State imposes a use tax upon the purchaser at a bankruptcy liquidation sale, with the trustee only being obliged to collect the tax from the purchaser and remit it to the State. Such an examination using the Goggin II facts will make even clearer the total lack of basis for the tenuous application of the Ninth Circuit's approach to the facts of this case, involving later rentals made by the purchaser's subsidiary.

The general principles underlying decision of this case are simple and longstanding. The essence of "our Federalism" is that the States, as States, have certain legitimate interests which the national government is bound to respect, even though its laws are supreme. *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100, 112 (1981); *Younger v. Harris*, 401 U.S. 37, 44 (1971). Paramount among the legitimate interests of the various States is the power to tax, for same provides the revenue by which those States provide their services to their constituent populations. The power to tax is thus inseparable from the State's ability to manage its internal affairs and should suffer only the most minimal interference consistent with the exercise of federal powers. *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 527 (1986); *James v. Dravo Construction Co.*, 302 U.S. 134, 150 (1937); *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298 (1943). The special position of the States in our federal systems is a "postulate" which limits and controls the construction of the scope of Congress' authority under its "enumerated

powers", for those postulates are the underlying federal premises upon which the Constitution is based. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985). In the context of an asserted conflict between federal sovereignty and the taxing powers of a State, these principles dictate that a "practical construction" be given to federal tax immunity limitations, and those limitations should neither be varied or extended so as to seriously impair either the taxing power of the state tax or the appropriate exercise of the federal function. C.f., *Massachusetts v. United States*, 435 U.S. 453, 459 (1978).

This Court has already defined what these practical limitations are in the bankruptcy context, for in upholding a municipal tax on property of a bankruptcy estate, this Court stated in *Swarts v. Hammer*, 194 U.S. 441 (1904), at page 444 that:

> " 'The question is not the extent of the power of Congress over the subject of bankruptcy, but what Congress intended by the Act of 1898. By section seven of that act the title to all of the property of the bankruptcy not declared to be exempt is vested in the trustee. By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the State and municipality, or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt."

The import of this statement is clear: property in a bankruptcy estate is taxable by the states absent a "clear" Congressional directive to the contrary, for the simple reason that property should shoulder its "fair share" of the tax burden supporting the benefits and protection which the States' governments provide to it.

In its present decision, the Ninth Circuit has finally reached the logical extension of the doctrine it first expressed in Goggin II,

here frustrating the efforts of a state taxing agency to collect "use taxes" based upon a bankruptcy liquidation sale purchaser's subsidiary's rentals of that same property in its subsequent normal course of business. The Ninth Circuit's reasoning essentially tortures the clear language of 28 U.S.C. § 960 (hereinafter "§ 960"), providing that any person "conducting any business under authority of a United States Court" is "subject to all Federal, State, and local taxes applicable to such business", by first construing same as excluding liquidation sales from its definition of "conducting any business"[8], and then finding that purported absence of authorization as constituting a statutory bar to such taxation. The Circuit Court then attempted to put a constitutional gloss on this reasoning by reasoning that *any* tax on a liquidation sale, even one whose incidence falls upon the purchaser rather than the trustee "hinders, delays or burdens" the bankruptcy estate and constitutes an "unlawful interference with the processes of the bankruptcy court." Goggin II, 245 F.2d at 46. As applied in Goggin II itself, this hinderance was found in the duty of collection of the use tax from the purchaser that California law would impose upon the bankruptcy trustee. Here, given that the trustee is not involved at all, the Circuit Court obviously had to predicate that interference as lying in the diminution in net purchase price accruing to the estate if the purchaser was not able to obtain the property free of the tax. Both of these lines of reasoning are totally faulty.

[8] This writer would note that this construction is totally contrary to the legislative history underlying the statute, for in its original form, this statute specifically included "liquidators" within its ambit. The language referring to liquidators was deleted along with all other functional nominatives in favor of the more generic "officers" when the statute was revised in 1948. As the Revisors Notes make clear, these changes were intended to make no substantive changes in the law. See, Note: "State Taxation of Bankruptcy Liquidations: Federalism Misconceived", 67 Yale L.J. 335 (1957) at 338-339.

A. 28 U.S.C. § 960 is an affirmation of the liability of bankruptcy estates for all applicable state taxes and is indicative of the general attitude of Congress in that regard. Moreover, even if silent in this area, that silence is certainly not properly construed as indicating a Congressional intent to exempt liquidation sale purchasers from "use tax" obligations

The Ninth Circuit's construction of § 960 literally stands all applicable principles of statutory construction on their head. Any fair reading of § 960 leads one ineluctably to the conclusion that it exists as an *affirmation* of, not a bar to the liability of bankruptcy estates for otherwise applicable state taxes—for it is worded in the affirmative and states a general rule of tax liability without stating *any* exceptions thereto. Such a construction is consistent with Congress' twin purposes in enacting same, i.e. first, to equalize the tax treatment and burdens between bankruptcy estates and "private" individuals undertaking similar taxable transactions outside bankruptcy, and second, to prevent state and local governments from being deprived of their normal sources of revenues. *Palmer v. Webster & Atlas National Bank*, 312 U.S. 156, 163 (1941). Given both this purpose and the fact that Congress has no power to enact a state taxing measure, it is clear that the statute must be read so that its operation is triggered not by any internal definition of what may or may not constitute "business", but instead by what the (state) tax in question defines as constituting taxable "business" activities—any other construction would completely defeat Congress' intent to equalize the burden of the tax. See *United States v. Sampsell*, 266 F.2d 631, 635 (9th Cir., 1959); *In re Penn Central Transportation Co.*, 325 F.Supp. 294, 298 (E.D. Pa., 1970). Section 960 is, in short, an affirmation of the liability of the bankruptcy estate, and all property in its custody, for all otherwise applicable state, local, and federal taxes.[9]

[9] Any doubt about this conclusion is dispelled by reference to other taxing provisions contained in the Bankruptcy Code which either presume such an expansive reading of the estate's tax liability or which themselves evidence Congress' lack of hostility to the efforts of state and local entities to collect their revenues. Thus, 11 U.S.C. § 728 provides a specialized tax treatment for state and local income taxes of a liquidated

This defect aside, the Ninth Circuit's construction of § 960 suffers from an even greater flaw, to wit: assuming that § 960 does not specifically authorize a state to impose a tax upon a bankruptcy estate, that lack of authorization does not constitute a bar to that taxation. Instead, the question simply becomes whether the Constitution itself implies or affords such an immunity. *Alabama v. King & Boozer*, 314 U.S. 1, 8 (1941). Put another way, the intention of Congress to proscribe state taxation in an area (such as the "enumerated" bankruptcy power) reserved to the federal government should neither be implied nor inferred where the Congressional intent to do so remains ambiguous at best, for a contrary rule of construction would create needless conflicts between the exercise of federal power and the sovereign powers reserved to the states under the Tenth Amendment. *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 275 (1943); see also *United States v. New Mexico*, 455 U.S. 720, 738 (1982); *Washington v. United States*, 460 U.S. 536, 540 (1983); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976).

Obviously, given the above, the Ninth Circuit's construction of § 960 as barring the tax in question completely lacks a reasonable basis and violates long standing rules of statutory construction.

B. There is No Implied Constitutional Immunity From a State's Taxation of the "Use" of Property Purchased from a Bankruptcy Liquidation Sale

The second rationale advanced by the Ninth Circuit in Goggin II was that the imposition of the California use tax upon a liquidation sale purchaser constituted an impermissible interference with the processes of the bankruptcy court. Such a conclusion has no basis in constitutional law.

---

estate, a treatment which itself obviously presumes the taxability of the potential capital gains resultant from the liquidation sale in the first instance. Similarly, 11 U.S.C. § 346, while providing instructions for how and by whom an estate is to report its state and local income tax liabilities, also specifically mandates that a trustee shall comply with any and *all* applicable state employment tax withholding and remittance requirements.

The general trend of constitutional analysis in approaching questions of implied intergovernmental immunity has been to accord the competing interests of state taxation and the exercise of essential federal functions a "practical construction," permitting both to function with a minimum of interference from each other, by utilizing considered judgments as to the minimum safeguards necessary for each to carry out its essential functions without hindering the power of the other. *James v. Dravo Construction Co., supra*, 302 U.S. at 156-157. Such tax immunity is based on the Supremacy Clause (Constitution Art. VI, cl.2), and while that clause obviously implies that, absent congressional consent, no state may impose the obligation to pay a tax directly upon the United States or its instrumentalities (*Mayo v. United States*, 319 U.S. 441, 447 (1943), the immunity is narrowly construed by the judiciary: whether the proper accommodation of those competing interests demands a broader exemption is felt to be the domain of Congress, as a body uniquely adapted to weighing and considering the interests involved. *United States v. New Mexico, supra* 455 U.S. at 737-738; see also *United States v. City of Detroit*, 355 U.S. 466, 474 (1958). This "narrow construction" means that the limitations on the doctrine are as significant as the doctrine itself: immunity is not conferred simply because the tax has an effect on the United States, even if the federal government ultimately pays the entirety thereof, for such a financial burden is considered to be the normal incident of the organization within the same territory of two independent taxing sovereigns. Such a construction complies with the constitutional imperative of extending the full range to each sovereign's taxing power. *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, 483 (1939); *Alabama v. King & Boozer, supra*, 314 U.S. at page 9. Similarly, neither is the tax barred even if it is imposed on federal property held in private hands, so long as it is the private citizen's possession or use thereof that is being taxed. *United States v. County of Fresno*, 429 U.S. 452, 462 (1977). Instead, tax immunity is appropriate only where the incidence of the levy either falls directly on or discriminates against the United States or upon an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities. *United States v. New Mexico, supra*, 455 U.S. at 733-735;

Washington v. United States, supra, 460 U.S. at 545-546; *United States v. City of Detroit, supra*, 355 U.S. at 473.[10] A use tax imposed upon the purchaser of property from a bankruptcy liquidation sale neither falls on nor discriminates against the federal government.

The California "use tax" in question herein is defined as an excise tax, imposed at the same rate as the sales tax, imposed upon the storage, use, or other consumption in California of property for which no California sales tax was paid at the time it was acquired from a retailer.[11] California Revenue and Taxation Code sections 6201, 6202. As relevant herein, "use" is generally defined as the exercise of any right or power incident to ownership of same, and it is presumed that any sale of tangible personal property for delivery in California is for the purpose of such "use". California Revenue and Taxation Code sections 6009, 6241. The use tax is a compensating complement to the California sales tax; the purpose of the use tax is both to equalize the competitive burdens of California businesses with those not subject to the sales tax, and to equalize the tax burdens regarding all tangible personal property situated in the State so that all will equally share in the support of the state government services they all enjoy.[12] *In re Los Angeles Lumber Products Co.*, 45 F.Supp.

[10] The reason for this requirement is simple. The limits of intergovernmental immunity are ultimately based upon the ability of an entity, through taxation, to destroy or emasculate the powers of its counterpart. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 428 (1819). However, if such taxation falls across a portion of the sovereign's constituency rather than solely on the federal government, the political check thereby engendered on that tax is felt to be a sufficient prophylaxis against its utilization in a destructive capacity. *Washington v. United States, supra*, 460 U.S. at page 545-546; *United States v. County of Fresno, supra*, 429 U.S. at page 458.

[11] A bankruptcy trustee is defined as a "retailer" for these purposes. California Revenue and Taxation Code § 6019.

[12] As applicable herein, the demands placed on state and local services by the "use" of the skis respondent acquired at the liquidation sale include, inter alia: construction and maintenance of the state and local roads utilized by respondent's customers to reach its facilities; state and

77, 85 (S.D. Ca., Central Div., 1942); *American Airlines, Inc v. State Board of Equalization*, 216 Cal.App.2d 180, 189-190, 30 Cal.Rptr. 590 (1963); *Bank of America National Trust & Savings Assoc. v. State Board of Equalization*, 209 Cal.App.2d 780, 791-793, 26 Cal.Rptr. 348 (1962); see also, *United States v. New Mexico, supra*, f.n. 12 at 738 (stating that for purposes of constitutional analysis there is no functional distinction between a "compensating" use tax and a "privilege" use tax as both have same operation and effect).

Such a tax is definitionally "non-discriminatory" for the purposes of constitutional analysis, for it leaves those subjected to it no worse off than those paying the sales tax,[13] it applies to all persons acquiring property "ex-tax" (from whatever source),[14]

local police protection; access to state courts to resolve disputes regarding or arising from that property's use; and, the provision of state and local health services to aid persons injured while using same. These are the same demands upon state services that underlie the general rule of taxability of property in bankruptcy estates. *Swarts v. Hammer, supra*, 194 U.S. at 444.

[13] This Board is not unmindful of the Ninth Circuit's observation that the measure of the use tax actually in question herein, i.e. that imposed upon rentals of tangible personal property for which no sales or use tax had previously been paid, could, to the extent that value of such rentals exceeded the original purchase price, possibly exceed the sales tax. That observation is unavailing for two reasons, however. First, the original use tax which was otherwise deferred (here because of Goggin II) was itself the same as the sales tax. Second, this potential result would be the product of an option by the purchaser to defer the tax at the time he acquired the property. 18 California Administrative Code (Sales and Use Tax Regulations) § 1660(c)(3). One must assume that such a choice would be the result of the conscious weighing of the merits of both options, the utility to the purchaser of the time/use of his money that he would otherwise pay up front for sales/use tax on the original purchase, and the fact that if the subsequent tax is applicable, it falls to his customer. See California Revenue and Taxation Code §§ 6205, 6206. Depending on circumstances, either side of the option offers obvious inherent commercial benefits.

[14] Property may be purchased ex-tax for "use" in California under a variety of circumstances separate and apart from the bankruptcy con-

while its purpose is to equalize the tax treatment regarding all tangible personal property situated in the state.[15] *Washington v. United States, supra*, 460 U.S. at page 544; *United States v. New Mexico, supra*, 455 U.S., *supra*, at pages 727-728; *United States v. County of Fresno, supra*, 429 U.S. at pages 464-465; *United States v. Detroit, supra*, 355 U.S. at pages 473-474.

Similarly, the "incidence" of this tax falls neither on the federal government nor any of its instrumentalities (even assuming, arguendo, that a bankruptcy trustee is such). As the California statutes make clear, the tax falls upon the rights of ownership acquired and exercised by the liquidation sale purchaser as a result of the sale. Such taxation has long been commonplace; even when measured by the value of the property, such taxation is not viewed as being upon the property but instead upon the *purchaser's* beneficial ownership interest thereof. *City of Detroit v. Murray Corporation*, 355 U.S. 489, 493-495 (1958); see also *West v. Oklahoma Tax Commission*, 334 U.S. 717, 725-727 (holding that inheritance tax not imposed upon exempt property held in trust by the United States, but instead upon the shift of "use" of same, and therefore validly taxed); compare Goggin II at page 45 (holding that this use tax is not upon purchaser, but is "in lieu of" and substitute for prohibited sales tax on bankruptcy estate). The fact that the counterpart sales tax arguably may not be imposed upon the (bankruptcy trustee) retailer does not defeat a use tax on the purchaser, for disparate treatment of a *private* taxpayer resulting from the United States' immunity from a state tax is not forbidden by the Supremacy Clause. *Washington v. United States, supra*, 460 U.S. at page 545, f.n. 10. The California

---

text, e.g. property can be bought in another State or Country and then brought into California, or property can be purchased from a tax-exempt entity such as the United States.

[15] The importance of the "equalization" factor in this analysis lies in much the same considerations which underlay Congress promulgation of § 960, i.e. the desire to avoid the creation of a distinct economic preference for businesses receiving or holding government property and the belief that such property must not evade its fair share of the (state and local) tax burden which supports the services it receives. See *Palmer v. Webster & Atlas National Bank, supra*, 312 U.S. at page 163.

tax falls upon the liquidation sale purchaser's possession and use of that property for his own private purposes, a possession and use which neither is "derivative" of or beneficial to that of the federal government. *Graves v. N.Y. ex rel O'Keefe, supra*, 306 U.S. at page 487. For the purpose of constitutional analysis, the incidence of that taxation falls neither upon the federal government nor any of its instrumentalities.

A use tax upon property purchased from a bankruptcy liquidation sale does not unconstitutionally burden the liquidation process. Only two possible burdens are apparent: first, the potential that the proceeds of the sale netted to the estate will diminish, essentially by the measure of the tax; and second, the duty imposed by California law upon the trustee to collect the use tax from the liquidation sale purchaser and remit it to the State (California Revenue and Taxation Code § 6203).[16] Neither postulate poses a cognizable constitutional burden on the liquidation process.

First, even disregarding the fact that the asserted fiscal burden essentially confuses the bankruptcy process with the end goal thereof (i.e. equitable distribution to the creditors), the fact remains that such an increased economic burden is one that the Constitution presupposes as arising as a normal incident of the two sovereign taxing powers within the same territory and is itself (i.e. without the presence of one of the factors discussed above) insufficient to trigger an implied immunity from the tax in question. *Penn Dairies v. Milk Control Commission, supra*, 318 U.S. at pages 269-271; *Graves v. N.Y. ex rel O'Keefe, supra*, 306 U.S. at page 483.

---

[16] It should be noted that, under the specific facts of this application of the Goggin rule, i.e. barring a use tax upon rentals of the ex-tax property occurring after the liquidation sale, only one of the burdens, i.e. the *potential* diminution of the liquidation sale price itself, is arguably present, for the duty of collection is not the trustee's, but instead that of the subsidiary of the liquidation sale purchaser, as lessor of the property to its customers.

The second asserted burden, the duty of collection, fares no better. It is a minimal burden,[17] designed to avoid the likelihood that in its absence liquidation sale purchasers would largely avoid payment of a tax which is legally theirs to pay, and does not constitute a constitutionally impermissible interference with the liquidation process. C.f. *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481-483 (holding Indian smokeshops permissibly required to collect state sales tax on articles sold to non-Indians).

C. Applying the Goggin II rationale to the facts of this case yields an absurd result

The facts of this case are totally divorced from underlying the Goggin II rationale. Here, the duty of collection falls not upon the trustee, but instead upon the subsidiary of the liquidation sale purchaser. Here, the incidence of the tax is not even upon the purchaser's "use" of the skis, but instead upon the ultimate rental customer's use of same arising out of what is obviously the purchaser's subsidiary's normal "course of business" (see 28 U.S.C. § 960). While Goggin II eschewed that its rule would create of a class of property which, by passing through bankruptcy, would be "sacrosanct" from state taxation (Goggin II, *supra* at page 46), that is obviously the precise result of the application of that rule herein. Such an application outstrips the basic rationale of the Goggin II opinion itself and furthers no bankruptcy interest save and except the constitutionally inconsequential negative effect such taxation might have on the net proceeds yielded to the estate by the liquidation sale.

---

[17] This conclusion is underscored by the fact that this duty is easy to apply, for the tax is a uniform rate set at the same (percentage of value) rate as the sales tax. Similarly, a trustee would become liable for the tax only if he failed to collect it from the purchaser. However, such liability would only arise if either the trustee or purchaser violate their recognized duties. Such eventualities are pure conjecture however, and an insufficient basis upon which to postulate a cognizable injury. *Rockford Life Insurance Co. v. Illinois Department of Revenue*, 482 U.S. ____, 96 L.Ed.2d 152, f.n. 10 at 160 (1987).

D. Conclusion

The use tax in question is an obviously valid exercise of the State's sovereign power of taxation of the property within its borders. The imposition of such a tax upon the purchaser of tangible personal property from a bankruptcy liquidation sale is a matter which Congress has expressly allowed. Even assuming, arguendo, that Congress has not expressly authorized such taxation, its silence in the matter does not constitute a bar thereto. Likewise, there is no Supremacy Clause problem with the imposition of such a non-discriminatory use tax upon a private party holding taxable incidents of ownership in his private capacity, where the only effects on the liquidation process are the indirect and inconsequential burdens of either imposing a duty of collection upon the trustee and/or potentially diminishing the amount netted to the estate as result of the sale.

II

A BANKRUPTCY COURT LACKS JURISDICTION TO INTERFERE WITH AND ENJOIN THE EFFORTS OF A STATE TO ASSESS AND COLLECT AN OTHERWISE VALID STATE TAX IMPOSED AGAINST A PERSON, NOT A PARTY TO A BANKRUPTCY PROCEEDING, WHERE THAT TAX CONCERNS USES OF PROPERTY SUBSEQUENT TO ITS PASSAGE FROM THE BANKRUPTCY ESTATE

The Board asserted the lack of bankruptcy jurisdiction over its dispute with respondent at all levels below. The Ninth Circuit handled this problem by predicating jurisdiction upon the powers of a bankruptcy court under Title 11 U.S.C. § 105 ("§ 105") to effectuate compliance with its prior judgments and orders. In the facts of this case, such an analysis is a tautological boot-strap which loses sight of the fact that a Congressional grant of bankruptcy jurisdiction over the instant dispute and the instant parties never exists in the first place: to the extent that the Bankruptcy Court's prior order meant to control the taxation of property after it left the bankruptcy estate, that order was clearly in excess of that court's jurisdiction.

It has been long established that Bankruptcy courts are courts of limited jurisdiction, whose powers must be expressly found in the Bankruptcy Code (*Baker & Taylor Drilling Co. v. Stafford*, 369 F.2d 552, 556 (9th Cir 1966); *Evarts v. Eloy Gin Corp.*, 204 F.2d 712 (9th Cir 1953), *cert den.* 346 U.S. 876, 74 S.Ct. 129, 98 L.Ed. 384 (1953)), and that bankruptcy jurisdiction does not exist to adjudicate disputes between third parties which do not involve the debtor or his property, unless settlement of same is necessary to administer the bankrupt's estate. *In re Shirley Duke Associates*, 611 F.2d 15, 18 (2d Cir 1979); *Evarts v. Eloy Gin Corp.*, supra. These precepts are followed through the newly enacted post-Marathon Congressional grant of jurisdiction to the Bankruptcy Courts, Title 28 U.S.C. § 157. Under same the Congressional grant of bankruptcy jurisdiction is exactly circumscribed by the above parameters. Here, the dispute is between third parties, it is over events occurring outside of and subsequent to termination of the bankruptcy proceedings, and the resolution of same is in no way necessary to complete the adjudication and/or distribution of the now long since dismissed bankruptcy or its estate. There is obviously no direct grant to be found in 28 U.S.C. section 157 for such jurisdiction.

The effect of the Ninth Circuit decision in this case is to extend bankruptcy jurisdiction to determine the taxability of property that once was the property of the estate, after it passes through the liquidation process to the hands of a third party. Such jurisdiction is ultimately founded upon the precept that once a bankruptcy court obtains jurisdiction over the property contained in the debtor's estate, then that jurisdiction continues to adjudicate rights to that property even after that property leaves the estate. That precept is simply incorrect. Bankruptcy jurisdiction does not follow the property, but is circumscribed by the outer limits of the estate itself; bankruptcy jurisdiction as to particular property lapses either when the bankruptcy estate is closed or when that property leaves the estate. *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987); *In re Chicago, Rock Island and Pacific Railroad Co.*, 794 F.2d 1182, 1186-1188 (7th Cir. 1986).

Such jurisdiction is reflected in Congress' definition of "core" under 28 U.S.C. § 157(b). By parity of reasoning, once the

property leaves the estate and the debtor no longer has an interest in same, this "core jurisdiction" ceases, and for continued bankruptcy jurisdiction to exist, there must be a separate and independent basis of bankruptcy jurisdiction to allow a bankruptcy court to adjudicate subsequent disputes between third parties as to their respective rights in and arising out of the ownership of that property. Id.; see also, *In re Idaho Agriquipment*, 54 B.R. 114 (Bky., Idaho, 1985) (bankruptcy jurisdiction not available to protect non-debtors).

No such jurisdiction exists in this case, for while it may be asserted that bankruptcy jurisdiction could be founded upon the amorphous "related to" jurisdiction found in 28 U.S.C. § 157(c), it is clear that such is both a totally unwarranted and unconstitutional extension of that limited jurisdictional grant. This Court expressed doubts about the validity of Congress' extension of "related to" jurisdiction under the present Bankruptcy Code's predecessor, the Act, in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In invalidating the Act's jurisdictional grant to "adjunct" bankruptcy judges as violative of Article III, this Court noted that "related to" jurisdiction carried with it the potential of unwarranted encroachment into the judicial power of Article III courts, for in many cases the rights therein adjudicated were based on state law rights antecedent to and independent of the bankruptcy filing itself. *Northern Pipeline Co. v. Marathon Pipe Line Co., supra,* 458 U.S. at page 84. Most obviously, such concerns are even more pervasive where these state law questions arise *subsequent* to the closure or dismissal of the bankruptcy estate. In this situation, such jurisdiction becomes a total non-sequitur, for there is not even a pending bankruptcy case whose needs are affected by or "related to" the controversy. It is a state law controversy between private parties unrelated to the bankruptcy process.

Congress attempted to address these concerns when it passed 28 U.S.C. § 157 in response to the *Marathon* decision. After the initial version of the bill came to the floor, it was noted that the potentiality of "related to" jurisdiction existing without an independent basis for Article III jurisdiction created a constitutional problem of great magnitude, for "it is doubtful that Title 11 of the

Code could constitutionally extend Article III jurisdiction to the adjudication of nondiversity state-created causes of action." Analysis of Senator Hatch, unanimously read into the record as part of the legislative history of P.L. 98-353, (1984) U.S. Code Congressional and Administrative News, No. 3, pages 602-604. Given this, it was urged that that jurisdictional grant could only be saved by providing mandatory abstention to remove cases lacking an independent Article III basis from bankruptcy jurisdiction. *Id.* It was urged that a contrary rule would usurp the constitutional power of the state courts to interpret their own law, and would allow federal courts to interpret state law in the absence of constitutional jurisdiction to do so. *Id.*, at page 596. Those concerns prompted Congress to engraft the mandatory abstention provisions found in the present 28 U.S.C. § 1334(c)(2) into the legislation. The import of this history is clear: Congress felt that "related to" jurisdiction existing outside of an independent Article III basis for federal jurisdiction raised constitutional problems rooted in the Tenth Amendment, and sought to deflect such problems by mandating the bankruptcy court to abstain from hearing same on the request of a party.[18]

The "constitutional problems" envisioned by Congress as lying within "related to" jurisdiction are squarely presented herein. There is no diversity in this case, nor is there a "federal question" save and except the question of the Board's potential violation of the Adversary Judgment through its efforts to tax respondent's activities. However, while the bankruptcy court obviously had personal jurisdiction over the Board in those Adversary Proceed-

---

[18] Here, the Board protested that no bankruptcy jurisdiction existed over the controversy and that the Court should abstain under equitable principles. While certainly not a formal request for mandatory abstention under § 1334(c), such is clearly the functional equivalent thereto, and given the fact that the principles underlying both are the same, should have been honored, a point not lost upon the bankruptcy court in finding abstention proper. This result is further underscored by the functional content of § 1334's abstention provision, essentially providing that no party may be subjected to "related to" jurisdiction under protest. Clearly, the State consistently protested the Bankruptcy Court's jurisdiction over this controversy throughout these proceedings.

ings, by reason of the general precepts expressed above, it had neither subject matter jurisdiction nor the power (under U.S.C. § 105) to attempt to order the affairs of respondent and petitioner relative to events (i.e. respondent's subsequent rentals of the skis) taking place outside the bankruptcy both after the property passed from the bankruptcy estate and after that estate was terminated. Such a determination was neither necessary to structure the affairs of the debtor nor to facilitate the orderly distribution of the estate. Cognizant of this problem, the Bankruptcy Court, in fact did not intend its order to have that effect.[19]

Given this, it is clear that the exercise of bankruptcy jurisdiction over such a question has no basis under Article III. Given that the controversy has no connection either with the debtor's rights and duties under bankruptcy law, or with the marshalling and disbursement of the bankruptcy estate it likewise outstrips the reach of Congress' exercise of bankruptcy power under Art. I, § 8, Cl. 4, even assuming that Congress had an intent contrary to that shown above. Federal judicial usurpation of a state court controversy with neither a constitutional basis nor a Congressional jurisdictional grant violates the Tenth Amendment by improperly invading the powers reserved to the States. *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *Hoyt v. Sears*, 130 F.2d 636, 637 (9th Cir., 1942), cert. den., 317 U.S. 687 (1943).

---

[19] It is clear that the bankruptcy court did not actually intend to do so, in that by its order denying the contempt citation, it not only held that the earlier order was improperly read as reaching the limits urged by respondent, but that such an order would have been beyond its jurisdiction. Of course, instead of paying that court deference in its construction of what was intended by its earlier order, and what would have been "necessary and appropriate" to enforce same, both the Bankruptcy Appellate Panel and Ninth Circuit substituted their own opinions as to what should have been meant therein. Compare *In re Xonics, supra* at 130 (on review of a denial of a contempt citation, a court's construction of its own order should be entitled to respect).

Obviously, the only way in which the appellate courts could have reached this conclusion was by essentially holding that the tax in question herein was barred by the rule of Goggin II, as a matter of law.

This conclusion is underscored when it is borne in mind that, in fact, Congress has specifically deprived federal courts of jurisdiction in a matter such as this, concerning disputes between the states and private parties over the propriety of the assessment and collection of state taxes.

Title 28 U.S.C. § 1341, known as the Anti-Tax Injunction Act, is an express congressional limitation on the jurisdiction of the federal courts to entertain any case which seeks relief that would have the effect of enjoining or suspending the levy, assessment, or collection of any state tax. *California v. Grace Brethren*, 457 U.S. 393, 407 et seq. (1982); *Bland v. McHann*, 463 F.2d 21 (5th Cir., 1972), *cert den.* 410 U.S. 966 (1973). This statutory bar to federal proceedings brought by private parties to restrain the collection of state taxes, relegates that party to its available state remedies in deference to the States' sovereign power of taxation; it was enacted to reaffirm that the basic precepts of comity between the federal courts and state governments essential to "our federalism" were to be "scrupulously" respected by the federal courts in the constitutionally sensitive area of federal interference with state taxation processes. *Fair Assessment in Real Estate Assoc. v. McNary, supra* 454 U.S. at 103 and 107-116. Obviously, the Application for Order to Show Cause initiating the present proceedings was meant to gain precisely the equitable relief directly proscribed therein.

Given this, it is clear that the Anti-Tax Injunction Act divested the bankruptcy courts of whatever theoretical shred of jurisdiction they may otherwise have had over this controversy.[20]

---

[20] Most obviously, the procedural aspects of the refund procedures fully comport with the requirements of the Anti-Tax Injunction Act. *California v. Grace Brethran, supra*; see also *Rosewell v. LaSalle National Bank, supra*, 450 U.S. at pages 479-483.

Some question could be raised, however, as to whether the state remedy is "available" to respondent given the reported decision, *Debtor Reorganizers v. State Board of Equalization*, antithetical to its position. Petitioner would note however that *Debtor Reorganizers* is not an opinion of the State's highest court and is not even binding on district courts of appeal in other appellate districts within the state, or even other divisions of the same district court of appeal. *Los Angeles Police Protective League v. City of Los Angeles*, 163 Cal.App.3d 1141, 1147, 209 Cal.Rptr. 890 (1985).

Moreover, even were the Anti-Tax Injunction Act not directly applicable, it should be taken as indicative of Congressional concerns in the area, under which this Court should construe the extent to which Congress meant to extend bankruptcy jurisdiction over the present dispute. See, e.g., *Fair Assessment in Real Estate Association v. McNary*, supra.

In its opinion, the Ninth Circuit choose to sidestep the issue of the jurisdictional basis for the present proceedings by finding that the Board had waived its right to complain of any jurisdictional error failing to appeal from the Adversary Judgment. However, this argument loses sight of the basic proposition that a party can collaterally attack an order forming the basis of a contempt citation where the court originally issuing that order lacked either personal or subject matter jurisdiction over him. See *United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S.Ct. 677, 91 L.Ed. 884 (1947); compare *Fong Sik Leung v. Dulles*, 226 F.2d 74, 78-79 (9th Cir., 1955) (reading *United Mine Workers* requirements in the conjunctive). An order meant to resolve the tax affairs of a liquidation sale purchaser after he removes that property from the estate would be simply outside a bankruptcy court's limited grant of subject matter jurisdiction. Given this, the issue of the jurisdiction of that Court to enter such an order may be raised for the first time in the instant proceedings re contempt. *United States v. Thompson*, 319 F.2d 665, 668 (2d Cir 1963).

The Circuit Court's opinion finds bankruptcy jurisdiction where no statutory or constitutional basis exists for it. Were this not enough, the opinion expands bankruptcy jurisdiction beyond its legal and logical bounds to where it comes into incontrovertible conflict with both the purposes and language of the Anti-Tax Injunction Act and principles of federal/state comity.

CONCLUSION

Contrary to the Ninth Circuit's Goggin II rule, a Bankruptcy Court may not enjoin a State's efforts to collect a "use tax" from the purchaser of tangible personal property from a bankruptcy liquidation sale. The States' power to levy and collect such a tax are grounded in the Tenth Amendment, and such efforts may be barred by a federal entity only where such are barred either by a direct act of Congress, exercising one of its enumerated powers or the Constitution.

The collection of such a tax is fully consonant with Congress' intent in passing 28 U.S.C. section 960. Even if that section did not specifically authorize such taxation, that lack certainly would not bar same, given both the rules of statutory construction and Congress' obvious general sympathy toward the States' efforts to equalize the burdens of taxation between like property and activities situated both inside and outside of bankruptcy.

Similarly, there is no constitutional problem with such taxation activities. The tax in question is non-discriminatory, and is imposed upon a private party. Any burdens placed upon the bankruptcy estate or upon bankruptcy processes through the imposition and/or collection of this tax from the purchaser are minimal. There is no constitutional bar to the States' power to collect such a tax.

Last, while under the facts of this case the Goggin II rationale clearly reaches an absurd result by finding such a bar without any benefit to the bankruptcy estate or bankruptcy processes, the instant decision suffers from a more basic defect. A Bankruptcy Court has no jurisdiction to bar a State's efforts to collect or impose a use tax against a person who rents property from a person who bought that property from a bankruptcy estate. There is no Congressional grant for such jurisdiction, and such runs afoul not only of the Anti-Tax Injunction Act, but of long-standing principles of federal/state comity.

For the foregoing reasons, petitioner California State Board of Equalization respectfully requests that the decision below of the Ninth Circuit be reversed.

DATED: January 26, 1989

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California

ROBERT F. TYLER
Supervising Deputy
Attorney General

Attorneys for Petitioner
California State Board of
Equalization

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to

the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

Appendix B

California Revenue & Taxation Code:

§ 6006 ..... A-4
6009 ..... A-6
6010 ..... A-6
6019 ..... A-7
6201 ..... A-8
6202 ..... A-8
6203 ..... A-8
6205 ..... A-10
6206 ..... A-10
6241 ..... A-10
6390 ..... A-11
6401 ..... A-11

California Sales & Use Tax Regulation

§ 18 California Administrative Code § 1660 ..... A-11

§ 6006. Sale

"Sale" means and includes:

(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. "Transfer of possession," includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter.

(b) The producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

(c) The furnishing and distributing of tangible personal property for a consideration by social clubs and fraternal organizations to their members or others.

(d) The furnishing, preparing, or serving for a consideration of food, meals, or drinks.

(e) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(f) A transfer for consideration of the title or possession of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication.

(g) Any lease of tangible personal property in any manner or by any means whatsoever, for a consideration, except a lease of:

(1) Motion picture, including television, films and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in transportation of persons or property as defined in Section 6023.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(B) A decedent from whom the lessor acquired the property by will or the laws of succession.

(6) A mobilehome, as defined in Sections 18008 and 18211 of the Health and Safety Code, other than a mobilehome originally

sold new prior to July 1, 1980, and not subject to local property taxation.

(7) Paragraphs (1) and (5) and Section 6094.1 shall not apply to rentals or leases of videocassettes, videotapes, and videodiscs for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the videocassette, videotape, or videodisc.

§ 6009. Use

"Use" includes the exercise of any right or power over tangible personal property incident to the ownership of that property, and also incudes the possession of, or the exercise of any right or power over, tangible personal property by a lessee under a lease, except that it does not include the sale of that property in the regular course of business.

§ 6010. Purchase

"Purchase" means and includes:

(a) Any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. "Transfer of possession," includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter.

(b) When performed outside this state or when the customer gives a resale certificate pursuant to Article 3 (commencing with Section 6091) of Chapter 2 of this part, the producing, fabricating, processing, printing, or imprinting of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the producing, fabricating, processing, printing, or imprinting.

(c) A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(d) A transfer for a consideration of tangible personal property which has been produced, fabricated, or printed to the special order of the customer, or of any publication.

(e) Any lease of tangible personal property in any manner or by any means whatsoever, for consideration, except a lease of:

(1) Motion picture, including television, films and tapes.

(2) Linen supplies and similar articles when an essential part of the lease agreement is the furnishing of the recurring service of laundering or cleaning the articles.

(3) Household furnishings with a lease of the living quarters in which they are to be used.

(4) Mobile transportation equipment for use in transportation of persons or property as defined in Section 6023.

(5) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor, as to which the lessor transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price of the property. For purposes hereof, transferor shall mean the following:

(A) A person from whom the lessor acquired the property in a transaction described in subdivision (b) of Section 6006.5.

(B) A decedent from whom the lessor acquired the property by will or by the laws of succession.

(6) A mobilehome, as defined in Sections 18008 and 18211 of the Health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980, and not subject to local property taxation.

(7) Paragraphs (1) and (5) and Section 6094.1 shall not apply to rentals or leases of videocassettes, videotapes, and videodiscs for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the videocassette, videotape, or videodisc.

§ 6019. Retailer; persons included; number of sales

Every individual, firm, copartnership, joint venture, trust, business trust, syndicate, association or corporation making more than two retail sales of tangible personal property during any 12-month period, including sales made in the capacity of assignee for the

benefit of creditors, or receiver or trustee in bankruptcy, shall be considered a retailer within the provisions of this part in his or its individual, firm, copartnership, joint venture, trust, business trust, syndicate, associate or corporate capacity.

§ 6201. Levy; rate

An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer on or after July 1, 1935, for storage, use, or other consumption in this state at the rate of 3 percent of the sales price of the property, and at the rate of 2½ percent on and after July 1, 1943, and to and including June 30, 1949, and at the rate of 3 percent on and after July 1, 1949, and to and including July 31, 1967, and at the rate of 4 percent thereafter.

§ 6202. Liability for tax; extinguishment

Every person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer is liable for the tax. His liability is not extinguished until the tax has been paid to this State except that a receipt from a retailer engaged in business in this State or from a retailer who is authorized by the board, under such rules and regulations as it may prescribe, to collect the tax and who is, for the purposes of this part relating to the use tax, regarded as a retailer engaged in business in this State, given to the purchaser pursuant to Section 6203, is sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

§ 6203. Collection by retailer from purchaser; receipt

Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter 8.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to

the purchaser a receipt therefor in the manner and form prescribed by the board.

As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

"Retailer engaged in business in this state" as used in this and the preceding section means and includes any of the following:

(a) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

(b) Any retailer having any representative, agent, salesman, canvasser, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, or the taking of orders for any tangible personal property.

(c) As respects a lease, any retailer deriving rentals from a lease of tangible personal property situated in this state.

(d) Any retailer soliciting orders for tangible personal property by means of a telecommunication or television shopping system (which utilizes toll free numbers) which is intended by the retailer to be broadcast by cable television or other means of broadcasting, to consumers located in this state.

(e) Any retailer who, pursuant to a contract with a broadcaster or publisher located in this state, solicits orders for tangible personal property by means of advertising which is disseminated primarily to consumers located in this state and only secondarily to bordering jurisdictions.

(f) Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, indicate deletion by telecommunication, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities.

(g) Any retailer owned or controlled by the same interests which own or control any retailer engaged in business in the same or a similar line of business in this state.

(h) Any retailer having a franchisee or licensee operating under its trade name if the franchisee or licensee is required to collect the tax under this section.

(i) Any retailer who, pursuant to a contract with a cable television operator located in this state, solicits orders for tangible personal property by means of advertising which is transmitted or distributed over a cable television system in this state.

§ 6205. Advertising or holding out that tax will be assumed, absorbed, or refunded

It is unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold or that if added it or any part thereof will be refunded.

§ 6206. Separate statement of price and tax

The tax required to be collected by the retailer from the purchaser shall be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sales.

§ 6241. Sale for taxable use presumed; burden of proof; resale certificate

For the purpose of the proper administration of this part and to prevent evasion of the use tax and the duty to collect the use tax, it shall be presumed that tangible personal property sold by any person for delivery in this State is sold for storage, use, or other consumption in this State until the contrary is established. The burden of proving the contrary is upon the person who makes the sale unless he takes from the purchaser a certificate to the effect that the property is purchased for resale.

(Added by Stats.1941, c. 36, p. 539, § 1.)

§ 6390. Rentals payable under lease of tangible personal property when rentals required to be included in measure of use tax or when property situated outside state

There are exempted from the computation of the amount of the sales tax the rentals payable under a lease of tangible personal property (a) when such rentals are required to be included in the measure of the use tax or (b) when such property is situated outside this state.

§ 6401. Property subject to sales tax

The storage, use, or other consumption in this state of property, the gross receipts from the sale of which * * * the purchaser establishes to the satisfaction of the board were included in the measure of the sales tax, is exempted from the use tax; provided, however, that this exemption does not extend to the possession of, or the exercise of any right or power over, tangible personal property by a leasee under a lease.

Regulation 1660. LEASES OF TANGIBLE PERSONAL PROPERTY—IN GENERAL

(a) DEFINITION OF "LEASE". The term "lease" includes rental, hire, and license. It includes a contract under which a person secures for a consideration the temporary use of tangible personal property which, although not on his premises, is operated by, or under the direction and control of, the person or his employees. "Lease", however, does not include a use of tangible personal property for a period of less than one day for a charge of less than twenty dollars ($20) when the privilege to use the property is restricted to use thereof on the premises or at a business location of the grantor of the privilege (see (e) below).

Where a contract designated as a lease binds the "lessee" for a fixed term and the "lessee" is to obtain title at the end of the term upon completion of the required payments or has the option to purchase the property for a nominal amount, the contract will be regarded as a sale under a security agreement from its inception and not as a lease. The option price will be regarded as nominal if it does not exceed $100 or 1 percent of the total contract price, whichever is the lesser amount.

(b) LEASES AS SALES OR PURCHASES.

(1) IN GENERAL. Any lease of tangible personal property in any manner whatsoever for a consideration is a "sale" as defined in Section 6006, and a "purchase" as defined in 6010, except a lease of:

(A) Motion picture films and video tapes, including television films and video tapes, whether or not they are productions complete in themselves. See, however, subdivision (d)(2) below for application of tax for periods on and after September 1, 1983, to leases of video cassettes, videotapes, and videodiscs for private use under which the lessee or renter does not obtain or acquire the right to license, broadcast, exhibit, or reproduce the video cassette, videotape, or videodisc.

(B) Linen supplies and similar articles, including such items as towels, uniforms, coveralls, shop coats, dust cloths, caps and gowns, etc., when an essential part of the lease is the furnishing of the recurring service of laundering or cleaning of the articles leased.

(C) Household furnishings with a lease of the living quarters in which they are to be used. The lessor of the household furnishings must also be the lessor of the living quarters. The living quarters must be real property rather than tangible personal property.

(D) Mobile transportation equipment for use in transportation of persons or property (see Regulation 1661).

(E) Tangible personal property leased in substantially the same form as acquired by the lessor or leased in substantially the same form as acquired by a transferor as to which the lessor or his transferor acquired the property in a transaction that was a retail sale with respect to which the lessor or the transferor has paid sales tax reimbursement or as to which the lessor or the transferor has timely paid use tax measured by the purchase price of the property.

As used herein, "transferor" means:

1. A person from whom the lessor acquired the property in a transaction described in Section 6006.5(b), or

2. A decedent from whom the lessor acquired the property by will or by law of succession.

For purposes of 1. above, the transaction will qualify if the property is acquired in a transfer of all or substantially all of the tangible personal property held or used by the transferor in all of his activities requiring the holding of a seller's permit or permits or in an activity or activities not requiring the holding of a seller's permit or permits, and the ownership of the tangible personal property is substantially similar after the transfer.

(F) A mobilehome, as defined in Sections 18008 and 18211 of the Health and Safety Code, other than a mobilehome originally sold new prior to July 1, 1980 and not subject to local property taxation.

(2) LEASES AS CONTINUING SALES AND PURCHASES. In the case of any lease that is a "sale" and "purchase" under (1) above, the granting of possession by the lessor to the lessee, or to another person at the direction of the lessee, is a continuing sale in this state by the lessor, and the possession of the property by a lessee, or by another person at the direction of the lessee, is a continuing purchase for use in this state by the lessee, as respects any period of time the leased property is situated in this state, irrespective of the time or place of delivery of the property to the lessee or such other persons. The application of tax to such leases is set forth below.

(c) GENERAL APPLICATION OF TAX.

(1) NATURE OF TAX. In the case of a lease that is a "sale" and "purchase" the tax is measured by the rentals payable. Generally, the applicable tax is a use tax upon the use in this state of the property by the lessee. The lessor must collect the tax from the lessee at the time rentals are paid by the lessee and give him a receipt of the kind called for in Regulation 1686. The lessee is not relieved from liability for the tax until he is given such a receipt or the tax is paid to the state.

When the lessee is not subject to use tax (for example, insurance companies), the sales tax applies. The sales tax is upon the lessor and is measured by the rentals payable.

Neither the sales tax nor the use tax applies to leases to the United States and its instrumentalities unless federal law permits taxing the instrumentality. For a more complete explanation regarding sales to the United States and its instrumentalities see regulation 1614.

The "rentals" subject to the tax include any payments required by the lease, including amounts paid for personal property taxes on the leased property, whether assessed directly against the lessee or against the lessor, but do not include amounts paid to the lessor for:

(A) Collection costs, including attorney's fees, court costs, repossession charges, and storage fees; but tax does apply to any delinquent rental payments, including those collected by court action;

(B) Insuring, repairing or refurbishing the leased property following a default;

(C) Cost incurred in defending a court action or paying a tort judgement arising out of the lessee's operation of the leased property, or any premiums paid on insurance policies covering such court actions or tort judgements.

(D) Cost incurred in disposing of the leased property at expiration or earlier termination of the lease;

(E) Late charges and interest thereon for failing to pay the rentals timely;

(F) Separately stated optional [insurance charges,] maintenance or warranty contracts.

(2) PROPERTY LEASED IN FORM ACQUIRED. No sales or use tax is due with respect to the rentals charged for tangible personal property leased in substantially the same form as acquired by the lessor, or by his transferor, as to which the lessor or transferor has paid sales tax reimbursement or has paid use tax measured by the purchase price. If such tax has not been

so paid, and the lessor desires to pay tax measured by the purchase price, it must be reported and paid timely with the return of the lessor for the period during which the property is first placed in rental service. A timely return is a return filed within the time prescribed by Sections 6452 or 6455, whichever is applicable.

(3) PROPERTY PURCHASED TAX PAID. In the case of property ultimately leased in substantially the same form as acquired, payment of tax or tax reimbursement measured by the purchase price at the time the property is acquired constituted an irrevocable election not to pay tax measured by rental receipts. The lessor may not change his election by reporting tax on rental receipts and claiming a tax-paid-purchase-resold deduction.

(4) PROPERTY ACQUIRED IN EXEMPT TRANSACTIONS.

(A) A purchaser of tangible personal property acquired in a transaction defined as an occasional sale in Section 6006.5(a) and leased in substantially the same form as acquired by him, may elect to pay use tax measured by the purchase price of the property in lieu of tax measured by rental receipts.

(B) A purchaser of tangible personal property acquired in a transaciton which qualifies under Section 6006.5(b) and leased in substantially the same form

RESPONDENT'S

BRIEF

BEST AVAILABLE COPY

QUESTIONS PRESENTED

a. Does an attempt to assess a tax assessable only because no sales tax was paid at the time of a bankruptcy liquidation sale violate an injunction against "commencing or continuing any act to impose, determine, assess, or enforce a sales or other tax . . . by reason of [the bankruptcy liquidation] . . . sale?"

b. May a party against whom an injunction was issued and who did not appeal entry of the injunction defend against proceedings to enforce the injunction by asserting that the court which issued the injunction lacked subject matter jurisdiction?

c. May a bankruptcy court, having issued an injunction, abstain from acting on an application to enforce the injunction?

d. Are liquidation sales conducted by bankruptcy estates subject to state sales tax?

e. If liquidation sales conducted by bankruptcy estates are not subject to state sales tax, can a state assess a tax on subsequent uses or transactions concerning the property which was the subject of the liquidation sale where the tax is assessable only because no sales tax was paid? (Stated more concisely, can the state assess a tax in lieu of the sales tax?)

TABLE OF CONTENTS

		Page
	Questions Presented	i
	Table of Authorities	iv
I	Statement of the Case	1
II	Summary of Argument	1
III	Argument	6
	a. ASSESSMENT OF A TAX ASSESSABLE ONLY BECAUSE NO SALES TAX WAS PAID AT THE TIME OF THE BANKRUPTCY LIQUIDATION SALE IS ASSESSMENT OF A TAX BY REASON OF THE SALE	6
	b. A FEDERAL COURT HAS JURISDICTION TO DETERMINE ITS OWN JURISDICTION AND, WHERE IT HAS DONE SO, ITS FINDING OF JURISDICTION AND ANY JUDGMENT BASED THEREON CANNOT BE COLLATERALLY ATTACKED	8
	c. THE BANKRUPTCY COURT ABUSED ITS DISCRETION WHEN, ACTING SUA SPONTE, IT PURPORTED TO ABSTAIN FROM HEARING A PROCEEDING TO ENFORCE AN INJUNCTION IT HAD ISSUED	16
	d. LIQUIDATION SALES ARE AN ESSENTIAL FUNCTION OF THE BANKRUPTCY PROCESS WHICH IS EXCLUSIVELY FEDERAL. THE STATES CAN HAVE NO POWER TO TAX SUCH FUNCTIONS EXCEPT TO THE EXTENT CONGRESS BY A SPECIFIC ACT GRANTS IT TO THEM. TITLE 28 UNITED STATES CODE SECTION 960 IS NOT SUCH A GRANT	19

TABLE OF CONTENTS–Continued

		Page
	e. THE STATES, LACKING POWER TO DIRECTLY TAX BANKRUPTCY LIQUIDATION SALES, CANNOT BE PERMITTED TO ASSESS TAXES IN LIEU OF DIRECT SALES TAXES	30
IV	Conclusion	34

TABLE OF AUTHORITIES

Page

CASES:

Brown v. Felsen, 442 U.S. 127, 99 S.Ct. 2205, (1979) 10, 11

California State Board of Equalization v. Goggin, 191 F. 2d 726, (C.A. 9th, 1951) ..... *passim*

California State Board of Equalization v. Goggin, 245 F. 2d 44, (C.A. 9th, 1957) ..... *passim*

Chicot County Drainage Dist. v. United States, 308 U.S. 371, 60 S.Ct. 317 (1940) 9, 12

Debtor Reorganizers Inc. v. State Board of Equalization, 58 Cal. App. 3d 691, 130 Cal. Rptr. 64 (1976) 15, 18

Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464 (1966) 24

Durfee v. Duke, 375 U.S. 107, 84 S.Ct. 242 (1963).. 9, 12

Fong Sik Leung v. Dulles, 226 F. 2d 74, (9th Cir., 1955) 13

In re Sampsell, 266 F. 2d 631 (C.A. 9th, 1959) 31, 32

In re White Motor Credit, 761 F. 2d 270, (6th Cir., 1985) 18

International Shoe Co. v. Pinkus, 278 U.S. 261, 49 S.Ct. 108 (1929) 19

Kalb v. Feuerstein, 308 U.S. 433, 60 S.Ct. 343 (1940) . 9, 11

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) ..... *passim*

Palmer v. Webster & Atlas Nat. Bank of Boston, 312 U.S. 156, 61 S.Ct. 542 (1941) 26

TABLE OF AUTHORITIES–Continued

Page

Richfield Oil Corporation v. State Board, 329 U.S. 69, 67 S.Ct. 156 (1946) 31

Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134 (1938) . 9, 12

Swarts v. Hammer, 194 U.S. 441, 24 S.Ct. 695 (1904) 24, 28, 30

Underwriters Nat. Assur. v. N. C. Life & Acc. Etc, 455 U.S. 691, 102 S.Ct. 1357 (1982) 9, 12

United States v. New Mexico, 455 U.S. 720, 102 S.Ct. 1373 (1982) 4, 23

United States v. Thompson, 319 F. 2d 665, (2nd Cir., 1963) 13, 14

United States v. United Mine Workers of America, 330 U.S. 258, 67 S.Ct. 677 (1947) 12

Washington v. United States, 460 U.S. 536, 103 S.Ct. 1344 (1983) 32, 33

CONSTITUTIONAL PROVISIONS:

United States Constitution

Article I, Section 10, Paragraph 20

Article I, Section 8, Paragraph 19

Tenth Amendment, ... 25

STATUTES:

Federal:

Frazier-Lemke Act 9, 11

Title 11 U.S.C. Section 105(a) 3, 14

Title 11 U.S.C. Section 305 16

TABLE OF AUTHORITIES–Continued

Page

Title 11 U.S.C. Section 326(a).....28
Title 11 U.S.C. Section 507(a)(7).....28
Title 11 U.S.C. Section 523(a)(1).....28
Title 11 U.S.C. Section 704(1).....20
Title 11 U.S.C. Section 721.....26
Title 11 U.S.C. Section 728(a) and (b).....28
Title 11 U.S.C. Section 1129(a)(7).....27
Title 11 U.S.C. Section 1225(a)(4).....27
Title 11 U.S.C. Section 1325(a)(4)).....27
Title 18 U.S.C. Section 152.....28
Title 28 U.S.C. Section 960.....4, 5, 19, 25, 26
Title 28 U.S.C. Section 1334(c).....16, 18
Title 28 U.S.C. Section 1334(c)(1).....17, 18
Title 28 U.S.C. Section 1334(c)(2).....17, 18, 19
Title 28 U.S.C. Section 1341.....11, 14, 15

State:

California Revenue and Taxation Code Section 6006.....7
California Revenue and Taxation Code Section 6390.....7
California Revenue and Taxation Code Section 6401.....7
California Revenue and Taxation Code Section 6006(g)(5).....7

I

STATEMENT OF THE CASE

This case comes before the United States Supreme Court on appeal from a bankruptcy court's refusal to make a finding of contempt based upon a violation of its own injunction. The procedural background and relevant facts are quite simple:

1. On July 27, 1983, after fully contested proceedings, the Bankruptcy Court entered an injunction which forbid the California State Board of Equalization ("the Board") from attempting to collect: (a) any sales tax on a certain bankruptcy liquidation sale; and (b) any other tax from any person by reason of such sale.

2. The Board did not appeal the injunction and, until its Petition for Certiorari to the United States Supreme Court, never asserted that the injunction was not valid.

3. In December, 1985 the Board assessed against Sierra Summit a use tax assessable under state law only because no sales tax had been paid on the bankruptcy liquidation sale.

4. Sierra Summit commenced proceedings to enforce the injunction. The Bankruptcy Court refused to hold the Board in contempt asserting: (a) that the assessment of the use tax did not violate the injunction; (b) that it lacked jurisdiction (to enforce its own injunction); and (c) that even if it had jurisdiction, it should abstain.

II

SUMMARY OF ARGUMENT

The assessment of a tax which, but for the failure to pay sales tax on the bankruptcy liquidation sale, would

not be due, is assessment of a tax by reason of the sale. While, as a general proposition, it is not unreasonable to give some deference to the opinion of the trial judge who issued an injunction in determining the intended scope of the injunction on contempt proceedings, deference does not mean absolute discretion. Where, as here, the trial judge adopts a view which is wholly inconsistent with the plain language of the injunction, that view need not be upheld simply because he also authored the injunction.

The Board has conceded that the injunction was intended to be coextensive with and to forbid the taxes proscribed by *California State Board of Equalization v. Goggin*, 191 F. 2d 726, (C.A. 9th, 1951), (hereinafter *"Goggin I"*) and *California State Board of Equalization v. Goggin*, 245 F. 2d 44, (C.A. 9th, 1957) (hereinafter *"Goggin II"*). The Ninth Circuit Court of Appeals, which decided *Goggin I* and *Goggin II* and which is, therefore, the most logical final arbiter of what those cases mean, unanimously held that the use tax the Board assessed against Sierra Summit violated *Goggin I, Goggin II* and the injunction.

In its Petition for Certiorari the Board asserted, for the very first time, that the injunction is invalid because the Bankruptcy Court lacked subject matter jurisdiction. The Bankruptcy Court specifically determined that it had subject matter jurisdiction after extensive proceedings in which the Board actively participated and asserted a lack of jurisdiction. For reasons known, if at all, only to the Board, the Board chose not to appeal the jurisdictional finding or the injunction. Its decision not to appeal the entry of the injunction notwithstanding, it is now the Board's position that, because the Bankruptcy Court

lacked subject matter jurisdiction, the Board can collaterally attack the injunction in this appeal from contempt proceedings brought to enforce the injunction. The Board's position cannot be reconciled with at least four opinions of the United States Supreme Court and is not supported even by the cases cited by the Board. Indeed, the Board has cited a United States Supreme Court case, which holds that even an illegal injunction must be obeyed until it is reversed on appeal, for the proposition that a party who, after a fully contested hearing in which it participated, has been enjoined, may ignore the injunction and relitigate its validity in contempt proceedings.

There is United States Supreme Court precedent for disregarding the doctrine of res judicata where Congressional or other public policy so requires. The Board has not named any public policy which would be furthered by condoning such duplicative litigation as they have caused here. No such public policy exists.

Even if the Board can attack the Bankruptcy Court's subject matter jurisdiction at this point in the case, the Bankruptcy Court, in fact, had subject matter jurisdiction. Jurisdiction was conferred by Title 11 U.S.C. Section 105(a) which authorizes a bankruptcy court to make such orders as are necessary to carry out the provisions of the Bankruptcy Code.

Although neither party raised or briefed the issue to the Bankruptcy Court and, notwithstanding its rulings that Sierra Summit should lose on the merits and that it lacked subject matter jurisdiction to enforce its injunction, the Bankruptcy Court also purported to abstain without citing any facts or law. This ruling makes sense

only as an attempt by the Bankruptcy Court to "appeal-proof" its ruling since, by statute, certain decisions to abstain are not reviewable by appeal or otherwise. In choosing to limit appellate review of decisions to abstain, Congress cannot have intended to enable a judge to evade appellate review of decisions merely by making a patently improper reference to the abstention statute. Such judicial conduct cannot be tolerated. Accordingly, although the literal language of the statutes forbids review, decisions to abstain must be reviewable on at least a limited, abuse-of-discretion, standard.

A bankruptcy liquidation sale is "an instrument employed by the government of the Union to carry its powers into execution" (*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436-437 (1819)). The bankruptcy estate is "an instrumentality so closely connected to the [Federal] Government that the two cannot realistically be viewed as separate entities, at least insofar as [bankruptcy liquidation sales are] concerned." *United States v. New Mexico* 455 U.S. 720, 735, 102 S. Ct. 1373, 1383 (1982). A tax on such an instrumentality of the federal government is so repugnant to the Constitution that no specific federal statute is necessary to forbid it.

While Congress could, by specific statute, concede to the states the power to tax bankruptcy liquidation sales, it has not done so. Title 28 U.S.C. Section 960 grants the states only the power to tax the operations of federal agents conducting a business under a federal court order. The purpose of this statute was to prevent businesses being operated under federal court order from competing

with an unfair advantage over similar, privately operated, businesses. There is nothing in the history of Section 960, or its predecessors, to suggest that it was intended to abdicate to the states any control whatsoever over the bankruptcy liquidation process itself.

That bankruptcy estates must pay state property and income taxes does not militate in favor of a finding that bankruptcy liquidation sales are taxable by the states. Bankruptcy estates are subject to such taxes because they fall due by reason of the nature and legal attributes of property of the bankruptcy estate and because Congress has specifically indicated that bankruptcy estates should be subject to such taxes. The primary purpose of bankruptcy is to facilitate an efficient liquidation of the property of the estate, not to enhance the value of property of the estate by changing its nature and legal attributes. Subjecting bankruptcy estates to uniform state income and property taxes does not grant the states any control over the liquidation process itself. Since the power to tax a transaction confers a power to control it, permitting the states to levy transactional taxes upon the liquidation process itself is equivalent to granting the states control over the process.

If the Court concludes, as Sierra Summit believes it must, that bankruptcy liquidation sales cannot be subjected to any direct form of state taxation, the Court must also forbid such indirect forms of taxation on bankruptcy liquidation sales as the use tax here in issue. Any other rule will make it a simple matter for the "subtle ingenuity of [state] legislative tax advisors" (*Goggin II*, 245 F. 2d at 46) to circumvent the basic rule that bankruptcy liquidation sales are not subject to state control, by taxation or

otherwise, and to exercise de facto control over the bankruptcy liquidation process. (See *McCulloch v. Maryland*, 17 U.S. at 431.)

III

ARGUMENT

a. ASSESSMENT OF A TAX ASSESSABLE ONLY BECAUSE NO SALES TAX WAS PAID AT THE TIME OF THE BANKRUPTCY LIQUIDATION SALE IS ASSESSMENT OF A TAX BY REASON OF THE SALE.

Sierra Summit seeks to enforce an injunction which enjoined the Board from "commencing or continuing any act to impose, determine, assess or enforce a sales *or other tax* against the . . . Receiver, debtor, its principals or *other parties* by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit Ski Corporation . . . ." [Emphasis added]. (P.C. App. Page A-28). Although the "buyer" named in the purchase and sale agreement was Snow Summit Ski Corporation, the agreement specifically provided for title to pass directly from China Peak, as debtor-in-possession, to Sierra Summit. The Board originally argued that, since Snow Summit was the purchaser, it was not enjoined from assessing any tax it wished against Sierra Summit. As the Ninth Circuit Court of Appeals noted, the Board made this argument only "half-heartedly" and abandoned it altogether at oral argument. P.C. App. page A-4.

Under California law, rental income from tangible personal property is exempt from sales tax but subject to a use tax. California Revenue and Taxation Code Sections

6390 and 6401. Sierra Summit asserts that imposition of this use tax is barred by *Goggin I*, *Goggin II*, and the injunction. To be subject to the use tax, the rentals must constitute sales as defined in California Revenue and Taxation Code Section 6006. This statute excepts from the definition of "sales" a lease of tangible personal property as to which the lessor has paid either sales or a use tax measured by the purchase price of the property. *Id.* Section 6006(g)(5). Thus, if Sierra Summit had paid a sales or use tax on the bankruptcy liquidation sale, it would not, under state law, owe the use tax the Board has assessed. The direct relationship between the use tax Sierra Summit complains of and the bankruptcy liquidation sale is clear. Since this use tax would not be due if sales tax had been paid in connection with the bankruptcy liquidation sale, it is equally clear that the use tax is a tax "by reason" of the sale, the collection of which was specifically enjoined.

Sierra Summit cannot, in good faith, ignore the fact that the same judge who originally issued the injunction found that it did not proscribe this use tax. The Bankruptcy Court did not adequately explain this finding. Its opinion merely recites that "By restraining the imposition of a tax on the sale of the assets by the debtor, the court did not restrain the imposition of a tax on the resale or rental of said assets by the purchaser". (P.C. App. Page 12.) It appears to Sierra Summit that the Bankruptcy Court was misled by the Board's false assertion in its Response to the Order to Show Cause re Contempt that Sierra Summit was attempting "to insulate itself from its sales and use tax obligation by making reference to a prior dispute between the Board and debtor China Peak Resort". (J.A. Page 10.)

Sierra Summit has made it clear at all levels that it is not attempting to use the fact that it purchased the subject property from a bankruptcy estate as an excuse to avoid payment of all taxes payable in connection with the property. For example, Sierra Summit has readily admitted that it would owe sales tax if it should resell the subject property since that tax is due whether or not sales tax was paid at the time of the prior purchase. Sierra Summit's objection to the use tax has always been that it is a substitute for the sales tax, due only because no sales tax was paid on the bankruptcy liquidation sale. The Bankruptcy Court appears not to have appreciated this distinction in making its ruling.

The Board has acknowledged that the injunction was intended to be coextensive with and to proscribe all taxes forbidden by *Goggin I* and *Goggin II*. (See Appellant's Opening Brief to the Ninth Circuit Court of Appeals, page 12). Of the six appellate court judges who have reviewed this matter, five, including all three at the Ninth Circuit Court of Appeals, have concluded that the use tax complained of was proscribed by *Goggin I*, *Goggin II* and the injunction.

b. A FEDERAL COURT HAS JURISDICTION TO DETERMINE ITS OWN JURISDICTION AND, WHERE IT HAS DONE SO, ITS FINDING OF JURISDICTION AND ANY JUDGMENT BASED THEREON CANNOT BE COLLATERALLY ATTACKED.

The Board did not appeal from the injunction. Rather, after several years, the Board simply chose to ignore it. In its Petition for Certiorari, the Board asserted for the first

time that the injunction was in excess of the Bankruptcy Court's subject matter jurisdiction and therefore void.

Where a federal court obtains personal jurisdiction over a party, it has jurisdiction to determine whether it has subject matter jurisdiction. Where the question of subject matter jurisdiction has been fully and fairly litigated and finally decided, a determination that subject matter jurisdiction is present is not, generally, subject to collateral attack. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134 (1938); *Chicot County Drainage Dist. v. United States*, 308 U.S. 371, 378, 60 S.Ct. 317, 320 (1940); *Durfee v. Duke*, 375 U.S. 107, 111, 84 S. Ct. 242, 245 (1963); *Underwriters Nat. Assur. v. N. C. Life & Acc., Etc.*, 455 U.S. 691, 102 S.Ct. 1357 (1982).

The United States Supreme Court has provided at least two examples of circumstances in which res judicata will not be rigidly applied to bar collateral attack upon a judgment. In *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343 (1940), the United States Supreme Court allowed a collateral attack upon a judgment of foreclosure which had been entered in violation of an automatic stay provided for in the Frazier-Lemke Act. The court noted that "Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to [the] principle [of res judicata] and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally." 308 U.S. at 438-439, 60 S.Ct. at 346. The court then held that Congress had clearly intended to accomplish such a result with the passage of the Frazier-Lemke Act (formerly codified as Title 11 U.S.C.) and reversed the judgment of foreclosure on the

grounds that the state court had acted after being completely ousted of its jurisdiction and without even considering whether or not this issue was or could have been litigated before the state court.

In *Brown v. Felsen*, 442 U.S. 127, 99 S.Ct. 2205 (1979), a creditor had obtained, by stipulation, a judgment against a debtor. The judgment debtor filed bankruptcy before satisfying the judgment. The judgment creditor sought a determination that the judgment was nondischargeable based on allegations of fraud in connection with the underlying debt. Before the trial court, the judgment debtor successfully asserted res judicata as a bar to the litigation of the fraud issues. The United States Supreme Court reversed. The court noted: (1) that because res judicata could govern matters not previously litigated and, thereby, block paths which might lead to the truth, it was to be "invoked only after careful inquiry" (442 U.S. at 132); (2) that, unlike the typical res judicata case, wherein one party was seeking to invalidate a judgment, the judgment creditor herein was not attacking the judgment at all but, rather, seeking to respond to the new defense of bankruptcy which had been interposed by the judgment debtor only after the entry of the judgment (442 U.S. at 133); and (3) that the interests and policies served by res judicata would not be furthered by forcing parties to anticipate such defenses as bankruptcy and to litigate all issues concerning them at a time when they were not, in fact, in issue (442 U.S. at 134). The court did note that, if the state court had actually tried the fraud issue using standards identical to those provided for in the Bankruptcy Act, its determination would have foreclosed any

further inquiry under the doctrine of collateral estoppel. 442 U.S. at 140, footnote 10.

In the case at bar, the question of the Bankruptcy Court's subject matter jurisdiction to issue the injunction was one of the primary issues litigated, if not *the* primary issue. The Bankruptcy Court specifically found that it had jurisdiction. J.A. page 9. The Board did not appeal this finding, but now, seeks a collateral review of the finding identical to the review which was available to them and which they failed to seek directly. The Bankruptcy Court's assertion of jurisdiction was neither frivolous nor unusual. While the Board contends that Title 28 Section 1341 deprived the Bankruptcy Court of jurisdiction, the statute did so, if at all, with nothing approaching the clarity of purpose by which the Frazier-Lemke Act deprived the state court of jurisdiction to render the judgment of foreclosure in *Kalb v. Feuerstein, supra*. The Bankruptcy Court found jurisdiction based on the long established precedent on point in the Ninth Circuit construing Section 1341 – *Goggin I*.

Unlike *Brown v. Felsen*, the Board's attempt to collaterally attack the injunction in this case is not a mere response to a new legal issue. Unlike the judgment creditor in *Brown v. Felsen*; the Board is seeking to wholly invalidate the injunction. For its part, Sierra Summit has done nothing new analogous to the filing of bankruptcy by the judgment debtor in *Brown v. Felsen*. Rather, Sierra Summit has merely attempted to get the Bankruptcy Court to enforce its injunction. Unlike *Brown v. Felsen*, wherein it was held that public policy would not be well served by forcing parties to anticipate and litigate all

potential bankruptcy issues, public policy clearly mandates that a court and all parties bear in mind, in determining whether an injunction shall issue, that enforcement of the injunction may later be sought. Finally, Sierra Summit, which reasonably relied on the injunction in not paying the use tax, now finds the state assessing not only the tax but also interest which has accrued during the intervening years and continues to accrue.

In its Petition for Certiorari (pages 16 and 17), the Board has contended that, because the Bankruptcy Court lacked subject matter jurisdiction to issue the injunction, it can collaterally attack the injunction, for the first time, before the United States Supreme Court on review from contempt proceedings. This position clearly contradicts *Durfee v. Duke, supra; Chicot County Drainage Dist. v. United States, supra; Stoll v. Gottlieb, supra;* and *Underwriters Nat. Assur. v. N. C. Life & Acc., Etc., supra,* and is not supported by the cases the Board cites.

The Board cites, for example, *United States v. United Mine Workers of America,* 330 U.S. 258, 293, 67 S. Ct. 677, 696 (1947) for the proposition that "a party's inability to collaterally attack an order forming the basis of a contempt citation arises only where that order was issued by a court possessing not only personal, but subject matter jurisdiction". (Petition for Writ of Certiorari, page 16). The relevant language from *United States v. United Mine Workers,* states: "Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by *orderly and proper proceedings.*" 330 U.S. at 293. [Emphasis

added.] A collateral attack on an injunction some five years after its entry can be considered neither "orderly" nor "proper". It would be anomalous for the Court to hold that a decision which stands for the proposition that an injunction, even an unlawful one, must be obeyed until reversed on appeal also stands for the proposition that a party can ignore an injunction which it actively opposed and then relitigate its validity in a contempt proceeding.

Likewise, *Fong Sik Leung v. Dulles,* 226 F. 2d 74, 78-79, (9th Cir., 1955), which the Board also cites in support of its position, does not support the notion that a collateral attack may be waged upon an injunction for the first time at contempt proceedings. In this case, the District Court had dismissed an application to establish United States citizenship after the guardian ad litem for the petitioner refused to obey an order directing him to submit to a blood test. The Ninth Circuit held that the District Court had no personal jurisdiction over the guardian ad litem as he was not a party to the action and that the dismissal was an improper attempt to coerce him into complying with an order beyond the court's jurisdiction by punishing the applicant. The case involved a direct appeal from the dismissal order not a collateral attack on the order to submit to the blood test. The court distinguished *United States v. United Mine Workers, supra,* noting that, in that case, unlike *Fong Sik Leung v. Dulles,* the court had personal jurisdiction over the persons enjoined. *Fong Sik Leung v. Dulles* does not, by any stretch of the legal imagination, support the position for which it has been cited by the Board.

The Board also cites *United States v. Thompson* 319 F. 2d 665, 668, (2nd Cir., 1963) for the proposition that it can

collaterally attack the injunction for the first time on contempt proceedings. *United States v. Thompson* involved a person who failed to respond to a subpoena. A subpoena issues ex parte and is obviously distinguishable from an injunction issued after a contested trial. The contempt proceedings represented the first time the party to whom the subpoena had issued appeared in court to challenge the jurisdiction and power of the court to issue the subpoena. The question presented was not one of res judicata but, rather, whether the witness had waived any right to object to the validity of the subpoena by failing to file a motion to quash. That is a decidedly different question from the question of whether a party, having actively participated in and lost a proceeding seeking an injunction, can relitigate the validity of the injunction years later when its enforcement is sought.

Finally, the Bankruptcy Court, in fact, had subject matter jurisdiction to issue the injunction. Title 11 U.S.C. Section 105(a) provides, in pertinent part, that "The [bankruptcy] court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Among the provisions of Title 11 are provisions authorizing, in some cases, and mandating, in others, liquidation of property of the estate. As is more fully discussed below, the assertion of control by the Board over this liquidation process by assertion of a power to tax it is wholly inconsistent with Title 11. The power to issue an order enjoining such interference is within the scope of Section 105(a).

Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464 (1966) supports the Bankruptcy Court's finding of jurisdiction. "[Title] 28 Section 1341 does not

act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." 385 U.S. at 358. While the case at bar was not brought by the United States, it was brought to enforce the principle that the instrumentality by which bankruptcy liquidation sales occur cannot constitutionally be taxed by the states.

Nor is there anything to indicate that 28 U.S.C. Section 1341 was intended to erode the power of the bankruptcy court to issue orders necessary to carry out the provisions of Title 11. Even if, as a general proposition, the ability of a Bankruptcy Court to enjoin collection of taxes inconsistent with the Bankruptcy Code is subject to the strictures of 28 U.S.C. Section 1341, in the case at bar, Section 1341, by its terms, is inapplicable.

Section 1341 provides that "the district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such state." Sierra Summit had no remedy in the California State court system, plain, speedy or otherwise. That system had already noted that it was not bound by the decisions of the Ninth Circuit in *Goggin I* and *Goggin II* and clearly indicated that it did not intend to follow them. (See, *Debtor Reorganizers, Inc. v. State Board of Equalization*, 58 Cal. App. 3d 691, 696, 130 Cal. Rptr. 64 (1976)). Therefore, pursuit of a state court determination by Sierra Summit would have been a useless and costly exercise.

c. THE BANKRUPTCY COURT ABUSED ITS DISCRETION WHEN, ACTING SUA SPONTE, IT PURPORTED TO ABSTAIN FROM HEARING A PROCEEDING TO ENFORCE AN INJUNCTION IT HAD ISSUED.

The Board has claimed that it requested that the Bankruptcy Court abstain from hearing the contempt proceedings. (See, Appellant's Opening Brief to the Ninth Circuit Court of Appeals, page 9). After a thorough review of the record before the Bankruptcy Court, however, Sierra Summit has been unable to find a single reference to abstention until the Bankruptcy Court's decision. Abstention was neither requested nor briefed by either party. It was tossed out sua sponte by the Bankruptcy Court with the terse statement "[the court] . . . is of the opinion that if it had jurisdiction it should abstain from exercising such jurisdiction" without further comment or explanation. P.C. App. page A-13.

The Bankruptcy Court's abstention ruling, which came on the heals of rulings that Sierra Summit was wrong on the merits and that the Bankruptcy Court lacked jurisdiction (to enforce its own order), makes sense in only one context – as an attempt by the Bankruptcy Court to render its decision nonappealable by reason of the provisions of certain abstention statutes rendering such a decision not reviewable by appeal or otherwise. (See, Title 11 U.S.C. Section 305 and Title 28 U.S.C. Section 1334(c)).

The Bankruptcy Court cited no facts or law in support of its decision to abstain. There are only three possibly applicable statutes, none of which, in fact, applies to this situation. Title 11 U.S.C. Section 305 provides, in

pertinent part, "the court . . . may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if - (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or (2)(a) there is pending a foreign proceeding . . . ". This section permits only the dismissal or suspension of an entire case and all proceedings therein. It does not contemplate or authorize abstention from an isolated proceeding within the case, as the Bankruptcy Court purported to do here. Further, in order to abstain under Section 305, the court must find that "the interests of creditors and the debtor would be better served by such dismissal or suspension". The Bankruptcy Court made no such finding. The record below is devoid of any evidence to support such a finding.

Title 28 U.S.C. Section 1334(c)(2) provides, in pertinent part "in a proceeding based upon a *state law claim or state law cause of action*, related to a case under Title 11 but not arising under Title 11 or arising in a case under Title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a state forum of appropriate jurisdiction." [Emphasis added]. This section is inapplicable because the question of the power of states to tax a federally mandated transaction arises under and is controlled exclusively by federal law.

Title 28 U.S.C. Section 1334(c)(1) provides, in pertinent part, "nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining

from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11." Again, this section has no application to this case because this case involves federal, not state law. Further, it would be a curious twist of "comity" and "respect for state law", indeed, for a federal court to abstain from hearing an issue controlled exclusively by federal law in favor of a state court system which has already ruled that it does not intend to follow the applicable law of the federal circuit in which the state is located. (See, *Debtor Reorganizers, Inc. v. State Board of Equalization, supra.*)

The Bankruptcy Appellate Panel and The Ninth Circuit Court of Appeals chose different methods for dealing with the problem created by the Bankruptcy Court's purported abstention. The Bankruptcy Appellate Panel simply held that the Bankruptcy Court had abused its discretion in purporting to abstain and reversed without discussing the provisions of 28 U.S.C. Section 1334(c), which forbid, under certain circumstances, appellate review of such a decision. P.C. App. page A-8. Although the Bankruptcy Court did not specify any authority for its abstention, the Ninth Circuit Court of Appeals concluded, somehow, that the Bankruptcy Court had purported to abstain under Section 1334(c)(1) and, in reliance on *In re White Motor Credit*, 761 F.2d 270, 273-274, (6th Cir., 1985), held that such abstention was subject to review.

The Ninth Circuit Court of Appeals did not address the issue of what happens if a bankruptcy judge specifically cites Section 1334(c)(2) in support of an abstention decision to which that section patently does not apply. Sierra Summit respectfully submits that, notwithstanding

the literal language of Section 1334(c)(2) limiting any form of appellate review, review with an abuse-of-discretion standard should be available in that narrow class of cases, such as this one, where the court clearly had no basis for abstention. Whatever legitimate purposes Congress may have had in mind when it chose to limit appeals from decisions to abstain, enabling a bankruptcy judge to "appealproof" decisions simply by mentioning abstention and citing, however inappropriately, the correct code section was surely not among them.

d. LIQUIDATION SALES ARE AN ESSENTIAL FUNCTION OF THE BANKRUPTCY PROCESS WHICH IS EXCLUSIVELY FEDERAL. THE STATES CAN HAVE NO POWER TO TAX SUCH FUNCTIONS EXCEPT TO THE EXTENT CONGRESS BY A SPECIFIC ACT GRANTS IT TO THEM. TITLE 28 UNITED STATES CODE SECTION 960 IS NOT SUCH A GRANT.

Congress has the power under the United States Constitution to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." United States Constitution, Article I, Section 8, Paragraph 4. Congress has exercised this power by enactment of the Bankruptcy Code. "The general rule is that an intention wholly to exclude from state action will not be implied unless, when fairly interpreted, an act of Congress is plainly in conflict with state regulation of the same subject. [Citations omitted]. In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation." *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265, 49 S.Ct. 108, 110 (1929). Among the duties of the bankruptcy

trustee under the Bankruptcy Code is the duty to liquidate the property of the estate. Title 11 U.S.C. Section 704(1). This liquidation process is necessarily excluded from regulation or control by the states.

The issue of whether bankruptcy liquidation sales can, without specific Congressional approval, be subjected to taxation is analytically identical to one of the issues presented in the case of *McCulloch v. Maryland, supra*. In that case, the State of Maryland passed a statute levying a tax on notes issued by the Bank of the United States. After first discussing the power of Congress to incorporate a bank and concluding that such power was inherent in the Constitution, the court turned its attention to the power of the states to levy taxes against the operations of such a federal instrumentality.

> "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. [United States Constitution, Article I, Section 10, Paragraph 2.] If the obligation of this prohibition must be conceded – if it may restrain a state from the exercise of its taxing power on imports and exports – the same paramount character would seem to restrain, as it certainly may restrain, a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant

> to another, as entirely repeals that other as if express terms of repeal were used.
>
> On this ground the counsel for the bank place its claim to be exempted from the power of a state to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.
>
> This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. . . .17 U.S. at 425-426.
>
> . . .
>
> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.
>
> But is this a case of confidence? Would the people of any one state trust those of another with a power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one state should be willing to trust those of another with a power to control the operations of a government to

which they have confided the most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is. . . .17 U.S. at 431.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax the judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states. . . .17 U.S. at 432.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. . . .17 U.S. at 436.

. . .

This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank, and is, consequently, a tax on

the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional." 17 U.S. at 436-437.

A tax on the transactions by which the liquidation mandated by the Bankruptcy Code is effectuated is no less inimical to the Constitution. The power to tax this essential bankruptcy process is the power to prevent it altogether. Any confidence we may enjoy that the states will not, in fact, do this, is irrelevant. The states have no legitimate business in asserting any control over the bankruptcy liquidation process.

It is quite true, as both the Board and amici have asserted, that the once broad principle of intergovernmental tax immunity which arose from *McCulloch v. Maryland*, has been narrowed and returned to its specific Constitutional premise. "What the Court's cases leave room for, then, is the conclusion that tax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or *instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." United States v. New Mexico*, 455 U.S. at 736. [Emphasis added]. The use tax here in issue is proscribed even by this narrow rule. For the "activity being taxed", *id.*, herein is, in reality, a bankruptcy liquidation sale. The sale was consummated by an estate which owed its authority and very power to act to an order of the Bankruptcy Court. The sale was also consummated pursuant to the Bankruptcy Code. In regard to this liquidation process, the federal government

and the bankruptcy estate "cannot realistically be viewed as separate entities", *id.*

Department of Employment v. United States, supra, supports the view that a bankruptcy estate, at least in connection with the essential liquidation process, is a federal instrumentality. In this case, the United States Supreme Court found that the Red Cross is "an instrumentality of the United States for purposes of immunity from state taxation levied on its operations". 385 U.S. at 358. The tax involved in *Department of Employment v. United States* was an unemployment compensation tax. That the Red Cross is exempt from such a tax on its operations does not, necessarily mean that a bankruptcy estate is, or should be. The bankruptcy estate is not an instrumentality of the federal government in an unlimited sense. Rather, it is such an instrumentality only in connection with its essential federal functions such as the liquidation process. Unlike the operations of the Red Cross, which is a primarily service-oriented entity, there is nothing inherent in the liquidation process which requires the bankruptcy estate to have employees. Thus, imposition of unemployment compensation taxes upon employees of bankruptcy estates would not interfere with any essential federal function of the estates.

Swarts v. Hammer, 194 U.S. 441, 24 S.Ct. 695 (1904), is also consistent with this construction of the Constitution. *Swarts v. Hammer* dealt with an obligation to pay a property tax. Such taxes were specifically excluded from the rule announced in *McCulloch v. Maryland,* 17 U.S. at 436. In bankruptcy cases the imposition of such taxes actually encourages the trustee to promptly liquidate in order to minimize the holding costs to the estate.

The Board and amici have noted that the power to tax was reserved to the States under the Tenth Amendment to the United States Constitution. Sierra Summit does not disagree with this general concept; however, under *McCulloch v. Maryland,* no state may levy "a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution". 17 U.S. at 436-437. A state law providing for such a tax is irreconcilable with the Constitution and, therefore, void.

The Board argues that Title 28 U.S.C. Section 960 has the effect of conferring on the states the right to tax bankruptcy liquidation sales. By its terms, it does so only if consummating such liquidation sales constitutes "conducting business". The United States Supreme Court has previously discussed and defined the purpose of the predecessor to Section 960.

> "The legislative history of the Act discloses its purpose. The committee reports accompanying the bill which became the Act of 1934 state: 'The purpose of this bill is to subject businesses conducted under receivership in Federal court to State and local taxation the same as if such businesses were being conducted by private individuals or corporations.' The reports advert to the fact that federal courts had held a federal receiver operating a business exempt from state sales tax. They conclude: 'No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue.'
>
> What Congress intended was that a business in receivership, or conducted under court order, should be subject to the same tax liability as the owner would have been if in possession and operating the

enterprise." *Palmer v. Webster & Atlas Nat. Bank of Boston*, 312 U.S. 156, 163, 61 S.Ct. 542, 545 (1941).

Thus, Congress, in enacting the statute now codified as 28 U.S.C. Section 960, intended to do no more than eliminate what had become a special class of operating businesses and to prevent these from competing at an unfair advantage with similar, privately operated, business. That Congress wanted persons operating businesses under court order to compete with other businesses on a level field does not, in any way, evidence an intent to cede any control whatsoever to the states over the essential liquidation process itself.

The Board notes that, in a prior form, Section 960 listed among the federal officers subject to taxation from business operations "liquidators". The Board argues that liquidators, by definition, liquidate. Therefore, says the Board, liquidation must be a form of conducting business within the meaning of Section 960. Sierra Summit has been unable to find a specific federal statute authorizing the appointment of a "liquidator" or delineating the duties of such a person. If such would further the liquidation process, there is no reason in law or logic why a liquidator could not be authorized to operate a business in liquidation and, if this were done, such operations would be subject to state taxation under Title 28 Section 960. Note, for example, that a bankruptcy trustee, although primarily charged with the duty to liquidate the estate, can, with court permission, operate the debtor's business "if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate." Title 11 U.S.C. Section 721.

Inability to levy a sales tax on bankruptcy liquidation sales will deprive the states of revenue in some cases. In

many cases, however, it will not. Where, for example, the debtor was a retailer, the property being sold in liquidation would have been sold anyway and the state suffers a deprivation of the opportunity to tax that transaction. Where, on the other hand, the debtor was in an asset-based service industry (such as a hotel, or an airline, for example) or was a manufacturer, the state, if allowed to tax the bankruptcy liquidation process, will reap a substantial windfall from taxing a transaction which, in the absence of the bankruptcy, might not have occurred at all. Further, since the debtor, in a plan under Chapters 11, 12, or 13 measures the minimum which must be paid to creditors against what they would receive in a Chapter 7 liquidation (See Title 11 U.S.C. Sections 1129(a)(7), 1225(a)(4), and 1325(a)(4)), if a Chapter 7 trustee must pay sales tax on the liquidation process, the debtor may deduct this tax from what must be paid to creditors under its plan, even though the debtor does not liquidate. Stated bluntly, in a case under Chapters 11, 12, or 13, if the law is that states can tax the liquidation process, *the debtor* can "pocket" the portion of the estate which would be required to satisfy such taxes to the detriment of the creditors.

It should be noted that the bankruptcy system, in general, benefits state taxing authorities substantially. There is no direct cost to the states from the bankruptcy system. The courts and court employees are exclusively federal. The trustee and other estate employees are paid either from filing fees or from the estate itself. While, pragmatically speaking, the state authorities do provide de facto protection of the property of the estate, it is also a federal crime to conceal property of the estate or to

receive property which is property of the estate with intent to defeat the provisions of Title 11. Title 18 U.S.C. Section 152. To the extent the States do protect *property* of the estate, they are, or, at least, can be, adequately compensated by levying taxes on such property. (See, *Swarts v. Hammer, supra.*) In general, an obligation owed to the state taxing authorities enjoys a priority status over payment of other claims and, in general, obligations owed to state taxing authorities are not dischargeable. Title 11 U.S.C. Sections 507(a)(7) and 523(a)(1). In short, the state taxing authorities have merely to fill out a claim form and wait for payment. Whatever minimal revenue the states may lose from not being able to tax the liquidation process is more than made up for by the value of this free "collection service". In a large case, the trustee's maximum commission for services rendered is approximately 3% of the money disbursed. Title 11 U.S.C. Section 326(a). To pay the Board twice that sum (California's state sales tax ranges from 6% to 6.5%) for no work at all is impossible to justify.

The Board has noted that bankruptcy estates are subject to other forms of taxation as a basis for its position that the liquidation process should be taxed. The Board specifically notes Title 11 U.S.C. Section 728(a) and (b), which clearly make bankruptcy estates liable for state income taxes. In a "pure" liquidation case (a case wherein the trustee does not operate the Debtor's business) such taxes arise primarily from capital gain. Capital gain income tax results from the "gain" on the liquidation of property of the estate. The "gain" is the difference between the recovery from the sale and the debtor's tax basis in the property. In our tax system we do not tax

increases in value as they occur but, rather, defer them to the time of a final transfer. Further, in our system, we, under certain circumstances, allow a deduction for "depreciation" or "cost recovery" of property which is either rising in value or, at least, not declining at the rate of the deduction. Such items are deducted from the tax basis and, thus, the tax is not waived, merely deferred until liquidation. These deferred taxes are, in effect, a debt owed by the debtor. This "debt" in a sense encumbers the property in which the Debtor has a tax basis lower than its fair market value, for the property cannot be sold without incurring the tax on the gain. There is nothing essential about the bankruptcy process which makes it necessary, or even desirable, from a systemic standpoint, to avoid the payment of these deferred taxes upon the liquidation process. This is true even though in some cases (where property in which the debtor has a low tax basis is encumbered to near its full value) property cannot be liquidated for the benefit of the estate because the income tax on the gain on the sale will exceed the net recovery. Such cases are not materially different from cases where the property is overencumbered.

For the Bankruptcy Code to allow liquidation of property in which the Debtor has a tax basis lower than its fair market value without payment income tax on the capital gain or to exempt property of the estate from property taxation would effect an essential change in the nature and legal attributes of the property itself. The purpose of the Bankruptcy Code is to foster the efficient liquidation of the estate not to create value by legally enhancing the nature and attributes of the property of the

estate. Thus, where property comes into the estate "burdened" by a low tax basis, no reason exists for eliminating that burden. This is consistent with both *McCulloch v. Maryland* and *Swarts v. Hammer*, the latter of which holds that no mysterious transformation takes place when property passes into a bankruptcy estate and state taxes which fall due by reason of the very nature and legal attributes of the property must be paid. State taxes on the liquidation process itself, however, are wholly repugnant to the Bankruptcy Code and the United States Constitution and need not be paid.

e. THE STATES, LACKING POWER TO DIRECTLY TAX BANKRUPTCY LIQUIDATION SALES, CANNOT BE PERMITTED TO ASSESS TAXES IN LIEU OF DIRECT SALES TAXES.

The Board takes the position that, even if it cannot directly tax bankruptcy liquidation sales, it can selectively levy a tax on the purchaser's subsequent uses of the property which are taxable under state law *only because no sales tax was paid at the bankruptcy liquidation sale*. A use tax which is assessable under state law only because no sales tax was collectible upon a bankruptcy liquidation sale operates the same as assessment of a direct sales tax on the liquidation process itself. To paraphrase *Goggin II*, "the same result is obtained by taxing the purchaser and requiring the trustee to collect, by collecting the impost from the purchaser, or by requiring the purchaser to collect a tax from its customers which it would not otherwise be required to collect." *Goggin II*, 245 F. 2d at 45.

The Board takes the position that the impact of the use tax is merely "indirect" and should not, therefore, be proscribed. After all, says the Board, the real taxpayer here, from a technical standpoint, is neither the bankruptcy estate nor the initial purchaser but, rather, the persons who rent the equipment from the initial purchaser. (Of course, the initial purchaser – Sierra Summit – is required to collect this tax from its customers and is liable to remit the same whether or not it in fact collects the tax.) The distance from the bankruptcy case has, says the Board, grown too great. To, again, paraphrase *Goggin II*, "[t]here is considerable sophistry in" the Board's argument. (See *Goggin II*, 245 F. 2d at 47.) But, as the *Goggin II* court noted, "[i]n a case such as the instant one, this Court is not bound by the state construction of the California tax. That construction is, as the Supreme Court said in *Richfield Oil Corporation v. State Board*, 329 U.S. 69, 84, 67 S.Ct. 156, 164, (1946), 'not determinative of the question of whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its *operation and effect*.'" 245 F. 2d at 48, footnote 14.

In support of its position, the Board cites *In re Sampsell*, 266 F. 2d 631 (C.A. 9th, 1959). The case is inapposite. First, that case involves federal not state taxes. The constitutional underpinnings of *Goggin I* and *Goggin II* have no application to federal laws and taxes. Second, in *In re Sampsell* the court held that the trial court had erred in failing to find that the trustee was operating a business. 266 F. 2d at 634. In the case at bar, the Bankruptcy Court, in its findings to support the injunction, found that the subject sale was a liquidation sale as distinguished from a

sale in the course of conducting a business. J.A. page 9. The Board could have appealed this finding as the United States did in *In re Sampsell*. It chose not to do so, however, and it is now too late.

In making its argument, the Board fails to distinguish properly the terms "indirect" and "immaterial". The effect of the use tax herein complained of upon the bankruptcy liquidation process is, undeniably, indirect. The effect is, however, far from immaterial. Impacts felt indirectly can impede the liquidation process just as completely as those felt directly. The *Goggin II* court was well aware of this fact and specifically warned against "the subtle ingenuity of legislative tax advisors". 245 F. 2d at 46.

Washington v. United States, 460 U.S. 536, 103 S. Ct. 1344 (1983), is not inconsistent with Sierra Summit's position that the states cannot impose a downstream use tax in lieu of a sales tax on bankruptcy liquidation sales. This case involved the sales tax laws of the State of Washington. Under this statutory scheme, where a contractor purchased materials to be used in connection with a contract to make improvements to real property, the property owner would, ordinarily, be considered the consumer for sales tax purposes and the tax would, therefore, fall upon the property owner. The statute made a specific exception for cases where the property owner was the United States in recognition of the fact that the United States could not be subjected to direct taxation. In such cases, the contractor was deemed the consumer and required to pay the sales tax. The Court found that a tax scheme which merely "switches the incidence of the tax from one party to a transaction to another when the party

that would ordinarily be taxed is immune" is not an impermissible circumvention of the federal government's tax immunity. 460 U.S. at 543, footnote 9. In *Washington v. United States*, however, taxation of the underlying transaction – the purchase of materials by the contractor from a supplier – did not involve any assertion of control over any federal operation and was clearly taxable. No good reason existed for the state to lose the revenue to which it was entitled on taxable transactions merely because the party which would normally be liable for the tax was exempt from direct taxation. Where, the transaction itself is taxable, the state is free to allocate the burden of the tax among the parties as it sees fit. The case at bar is distinguishable from *Washington v. United States* in that the transaction here in issue – a bankruptcy liquidation sale – is not taxable. The state is not free to assert control by taxation over such a federal instrumentality merely by assessing the tax against a nongovernmental party.

If the Court should conclude that bankruptcy liquidation sales are not subject to direct taxation but endorse the Board's position that downstream, indirect, taxation is permissible, it will have made it simple for the states to circumvent federal law and will render its ruling that bankruptcy liquidation sales are not subject to direct taxation an ineffective academic endeavor. Having once recognized the power of the states to levy such indirect taxes on bankruptcy liquidation sales, the Court will have abdicated any control over the nature and amount of such taxes. The states could, for example, levy an indirect tax equal to 50%, 100% or even a greater percentage of the purchase price. Whatever confidence the court may have that the states will not in fact levy such a prohibitive

tax is irrelevant. The concession of such power to the states is repugnant to the United States Constitution. *McCulloch v. Maryland*, 17 U.S. at 425-426.

IV

CONCLUSION

The opinion of the United States Court of Appeals for the Ninth Circuit should be affirmed. This matter should be remanded to the United States Bankruptcy Court for the Eastern District of California, Fresno Division, with instructions to hold the Board in contempt and to levy an appropriate sanction.

DATED: March 1, 1989

Respectfully submitted,

LANG, RICHERT & PATCH

BY DAVID RAY JENKINS,
Attorneys for Sierra Summit, Inc.

REPLY

BRIEF

No. 88-681

Supreme Court, U.S.
FILED
MAR 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

VS.

SIERRA SUMMIT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER ON THE MERITS

JOHN K. VAN DE KAMP
Attorney General of
the State of California
ROBERT F. TYLER*
Supervising Deputy
Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5155
Attorneys for Petitioner
California State Board
of Equalization

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Summary of argument	1
Argument	5
I	
Res judicata does not bar consideration of the instant issues	5
II	
The imposition of a use tax upon the purchaser from a bankruptcy liquidation sale violates no principles of intergovernmental tax immunity	7
III	
Congress has not preempted state taxation in this area	11
Conclusion	19

TABLE OF AUTHORITIES CITED

Cases

Page

Barton v. Barbour, 104 U.S. 126 (1881) 16
Brown v. Felsen, 442 U.S. 127 ..... 2, 6
Complete Auto Transit Inc. v. Brady, 430 U.S. 274 .....8, 13
Diamond National v. State Board of Equalization, 425 U.S. 268 ..... 3, 9
Douglas Aircraft Co., Inc. v. Johnson, 13 C.2d 545, 90 P.2d 313 (1939) 9
Felt & Tarrant Co. v. Gallagher, 306 U.S. 62 (1939) 3, 6, 9, 11
First Agricultural National Bank v. State Tax Commission, 392 U.S. 339 .....8, 18, 19
Graves v. N.Y. ex rel. O'Keefe, 306 U.S. 466 (1939) ..3, 8, 10
Group No. 1 Oil Corp. v. Bass, 283 U.S. 279 9
Howe v. Atlantic, Pacific & Gulf Oil Co., 4 F.Supp. 162 (W.D. Mo. W.D. 1933), *rev'd* 70 F.2d 360 (8th Cir. 1934) 12, 13
In re American Associated Systems, Inc., 373 F.Supp. 977 (Ky. 1974) 16
In re Chicago, Rock Island and Pacific Railroad Co., 794 F.2d 1182 (7th Cir. 1986) 5
In re Fleetwood of Hendersonville Hotel Corporation, 45 F.2d 670 (4th Cir. 1930) 12
In re Hatfield Construction Co., 494 F.2d 1179 (5th Cir. 1974) 10, 15
In re Idaho Agriquipment, 54 B.R. 114 (Bky., Id. 1985) .. 6
In re Leavy, 85 F.2d 25 (2d Cir. 1936) 10, 15, 16
In re Mason Tire and Rubber Co., 39 F.2d 462 (N.D. Ohio E.D. 1930) 12
In re Mid America Co., 31 F.Supp. 601 (S.D. Ill. 1939) .. 14
In re Sunrise Construction Co., Inc., 39 B.R. 668 (D.C. Wyo., 1984) 14
In re Warmings A.G. Food Center, 50 B.R. 748 (Bky. Me. 1985), *aff'd without opinion*, 782 F.2d 1024 (1st Cir. 1985) 14, 15
In re Xonics, Inc., 813 F.2d 127 (7th Cir. 1987) 5, 6
International Shoe Corp. v. Pinkus, 278 U.S. 261 (1929) .. 9, 10

TABLE OF AUTHORITIES CITED

CASES

Page

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616, 94 L.Ed.2d 615, 107 S.Ct. 1442 (1987) 4, 18
Kansas City, Mo. v. Johnson, 70 F.2d 360 (8th Cir. 1934) 12, 13
Kokoszka v. Belford, 417 U.S. 642 (1974) 10
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ... 11
Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926) 3, 8, 13
Michigan v. Michigan Trust Co., 286 U.S. 334 (1932) 9, 12, 13, 17, 18
Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986) 14, 15
McCulloch v. Maryland, 4 Wheat. 316 (1819) 2, 8
Moe & Salish v. Kootenai Tribes, 425 U.S. 463 (1976) ... 10
New York v. United States, 326 U.S. 572 9
Oklahoma Tax Commission v. Texas Co., 336 U.S. 342 (1949) 8
Palmer v. Massachusetts, 308 U.S. 79 (1939) 15
Puerto Rico Department of Consumer Affairs v. Isla Petroleum, ____ U.S. ____, 108 S.Ct 850 (1988) 18
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 18
South Carolina v. Regan, 465 U.S. 367 (1984) 7, 8, 10
Spector Motor Service v. O'Connor, 340 U.S. 602 (1951). 13
State of Missouri v. Gleick, 135 F.2d 134 (8th Cir. 1943). 14
Swarts v. Hammer, 194 U.S. 441 (1904) 4, 9, 10, 11, 12, 15, 18
United States v. Mississippi Tax Commission, 412 U.S. 363 19
United States v. State Board of Equalization, 536 F.2d 294 (9th Cir. 1976) 3
Vass v. Conron Bros. Co., 59 F.2d 969 16
Willcuts v. Bunn, 282 U.S. 216 (1931) 8

Statutes

11 U.S.C. § 721 14
28 U.S.C.:
§ 959(a) 15, 16
§ 959(b) 14, 15, 16
§ 960 .....2, 4, 11, 12, 14, 15, 16, 17, 18, 19

No. 88-681

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

VS.

SIERRA SUMMIT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER ON THE MERITS

SUMMARY OF ARGUMENT

This case does not involve state taxes which are imposed on, which discriminate against, or which unduly burden the bankruptcy liquidation process. Instead, the California use tax at issue is a non-discriminatory tax imposed upon a bankruptcy liquidation sale purchaser's private enjoyment of the privilege of the use of said property *after* it passes from the bankruptcy estate. That use and enjoyment is distinct from the prior possession of the property by the bankruptcy court and a state's efforts to tax same do not raise a constitutionally significant burden upon bankruptcy processes.

Both Respondent and amici[1] present hypertechnical and sometimes factually erroneous arguments by which they seek to assert various conflicts between such taxation and the processes of the bankruptcy court. They ultimately conclude that a conflict exists both on a constitutional and statutory plane, and assert that any sales or use tax on property received by a private party from a liquidation sale is barred. Similarly, they argue that petitioner (hereinafter, "the Board") is precluded by the doctrine of res judicata from presently litigating these issues. These arguments are in essence, only an attempt to engage in the type of overly formalistic analysis now held in utter disregard by this Court.

Res judicata is no bar to consideration of the present controversy. While respondent and amici banks urge that such should be found due to the bankruptcy court's implicit finding that it had subject matter jurisdiction over the initial taxation controversy between the trustee and the Board, the irrelevancy of the point is facially demonstrated by the facts that the instant contempt citation not only was brought by a non-party to those proceedings, but that same concerned an issue, the taxability of the purchaser's assignee's customer's "use" of the property, that was clearly not only *not* within the contemplation of the parties in 1983, but was a matter that the bankruptcy Court could not have adjudicated at that time. Res judicata is not properly applied where its application would compel parties to litigate hypothetical questions to obtain essentially advisory opinions concerning potential future controversies between themselves and non-parties so as to protect their right to litigate same in the future. *Brown v. Felsen*, 442 U.S. 127, 134-135.

Second, respondent and amicis' various arguments that the imposition of a sales or use tax upon the purchaser of property from a bankruptcy liquidation sale is barred both under 28 U.S.C. § 960 and under the principles enunciated in *McCulloch v. Maryland* lack substantive basis in applicable law or fact. Respondent

---

[1] Hereinafter, the brief of amici First National Bank of Boston and Security Pacific National Bank, will be referred to as that of "amici banks". Similarly, the brief of Amicus Kenneth Spears, Bankruptcy Trustee will be referred to as that of "Amicus Trustee".

and amicis' attempt to fashion a constitutional bar to the imposition of such taxes represents a completely formalistic approach which, which contrary to long established precedent, seeks both to ignore any "practical construction" of the transactions in question and the constitutionally determined incidence of the taxes thereon. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-524 (1926) (factual bases underlying resolution of the claim of intergovernmental tax immunity are to be given a "practical construction"). Contrary to the rather strained arguments respondent and amici make concerning the incidence of these taxes, the practical construction this Court has given these taxes conclusively demonstrates that these taxes are nondiscriminatory in nature and that their legal incidence falls not on the bankruptcy liquidation sale or trustee, as respondent and amici suggest, but instead on the purchaser, or in the case of its subsequent rentals of the property, its lessees. *Diamond National v. State Board of Equalization*, 425 U.S. 268 (incidence of California sales tax falls on purchaser, rather than vendor, as matter of "practical" (constitutional) analysis, despite contrary construction of California courts); *Felt & Tarrant Co. v. Gallagher*, 306 U.S. 62, 67 (1939) (incidence of California use tax upon goods purchased from interstate retailer falls not upon interstate commerce, but instead upon purchaser's privilege of use after that commerce is at end); *United States v. State Board of Equalization*, 536 F.2d 294, 295 (9th Cir. 1976) (incidence of California use tax on rental of personal property falls on lessee).

The general rule, applied both in Constitutional and statutory analysis is that exceptions to the various States' ability to tax will not be implied absent either clear conflict with the exercise of federal powers or clear Congressional expression of its intent to preempt those areas from state taxation. The only effect that the imposition of a sales or use tax on a purchaser from a bankruptcy liquidation sale has upon the bankruptcy process is the economic consequence the tax has in potentially diminishing the proceeds of the liquidation sale netted to the bankruptcy estate. Such an effect is constitutionally inconsequential, for such is presupposed as one of the normal incidents of our federal system. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466, 483 (1939).

Similarly, amici banks' argument that Congress intended by 28 U.S.C. § 960 (hereinafter "§ 960") to draw a distinction between the activities of a liquidating trustee and a bankruptcy trustee conducting an ongoing business, thereby allowing the taxation of business activities while denying same as to liquidation, is sorely misplaced. Most importantly, the argument is irrelevant. As before, this case involves taxes whose incidence lies outside bankruptcy. No statutory analysis of bankruptcy law is necessary or appropriate to adjudicate the question presented. Moreover, even considered on its merits, amici banks' argument is spurious. The general rule at all relevant times has been that the ability of the states to tax bankruptcy sales and property is presumed, with the only question being whether that state tax, by its own terms, would apply to same. *Swarts v. Hammer*, 194 U.S. 441, 444 (1904). Title 28 U.S.C. § 960 (hereinafter "§ 960") was an affirmative expression by Congress of its intent to subject all commercial activity undertaken by bankruptcy estates to all applicable state taxes, and most clearly was not meant as abridgement of the States' taxation powers. Moreover, even if Congress did not intend § 960 to specifically allow state taxation of bankruptcy liquidation sales, it is clearly inappropriate, as amici banks' suggest, to broadly construe that silence as a Congressional intent to preempt state taxation of bankruptcy liquidation and reorganization[2] activities. *Swarts v. Hammer, supra*; see also, *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 672 (Scalia, dissenting).

---

[2] Amici Banks' interest is stated to arise from a sale effected under a Bankruptcy Reorganization under Chapter 11, not a liquidation sale under Chapter 7. Such is the "liquidating 11" adverted to in footnote 1 of Petitioner's Brief on the Merits, pp. 5-6. The result thus urged by amici thus underscores the illogic of their reasoning, to wit: they urge this Court to construe § 960 to preempt taxation of transactions facially contained within that same section, i.e. sales done in the process of a business reorganization.

ARGUMENT

I

RES JUDICATA DOES NOT BAR CONSIDERATION OF THE INSTANT ISSUES

Both Respondent and amici bank assert that this Court should decline to adjudicate the instant controversy under the doctrine of res judicata. The argument centers around their contention that the Board should have appealed from the judgment rendered in the 1983 adversary proceeding brought against it by the trustee, and that, having failed to do so, it had no ability to contest the merits of respondent's subsequent application for a contempt citation. Application of res judicata to bar consideration of the instant controversy is totally inappropriate.

At issue within the 1983 adversary proceedings were the trustee's efforts to obtain a ruling defining the duties and obligations he and debtor may have had to the Board under the sale made of the debtor's assets in those Chapter 11 proceedings. Jt.App., p. 8, Finding of Fact #12. Conversely, the question of the imposition of a use tax against respondent was simply neither raised nor adjudicated. Respondent was not a party to that proceeding, and respondent's tax duties and obligations to the Board were clearly not the concern of the trustee in bringing the action.

Respondent lays much stock in the ambiguous wording of the order, asserting that that order was specifically intended to enjoin the Board from assessing or collecting taxes on "other persons" "by reason of the (liquidation) sale" (see Pet.Cert., App. A-12), and argues that the court thereby impliedly found that it had subject matter jurisdiction over any subsequent attempt by the Board to assess *any* tax against *any* other person (as long as some nexus could be drawn between the liquidation sale and the tax sought to be imposed). Contrary to this assertion, the correct assumption is that the bankruptcy framed its order to lie within the proper parameters of its jurisdiction. That jurisdiction is limited to the gathering and distributing of the debtor's estate and providing the debtor a fresh start. *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987); *In re Chicago, Rock Island and Pacific*

Railroad Co., 794 F.2d 1132, 1186-1188 (7th Cir. 1986). Conversely, it is nowhere apparent that the court meant to adjudicate any of the duties or obligations of the liquidation sale purchaser, its assignee (respondent), or respondent's customers for any use taxes they may owe by reason of the privilege of their possession of that property after it passed from the bankruptcy estate. As non-debtors, their rights and obligations were simply not matters within the scope of bankruptcy jurisdiction. *In re Idaho Agriquipment*, 54 B.R. 114 (Bky., Id. 1985). As a matter of law, their rights in, or use and possession of that property is legally distinct and severable both from the prior possession of same by estate and the bankruptcy liquidation process. *Felt & Tarrant v. State Board of Equalization, supra* 306 U.S. at 67. The above was obviously understood by the same court that entered that judgment when it denied respondent (a non-party whose rights were not thereby brought into issue) the contempt citation it sought against the Board. That construction is one which should be paid full deference in determining whether, as a question of fact, res judicata should be applied against the Board herein. *In re Xonics, Inc.*, 813 F.2d 127, 130 (7th Cir. 1987).

Res judicata, because it may govern grounds and defenses not previously litigated, can, as is being attempted here, block litigation of "unexplored paths", and is accordingly to be invoked "only after careful inquiry". *Brown v. Felsen, supra* 442 U.S. at 132. Where the defense is asserted in circumstances that would have mandated the parties to have anticipated and litigated hypothetical factual situations so as to have the court render essentially advisory opinions in the prior proceedings, the purposes of the doctrine are not served, and it is not properly applied. *Brown v. Felsen, supra* 442 U.S. at 134-135, 137. Here, under respondent and amici's construct, the Board could only have preserved its right to litigate the merits of the contempt citation sought by respondent by litigating respondent's and/or its customer's tax obligations within the 1983 proceedings. However, it is clear that the trustee had no incentive to litigate same. Similarly, given that those obligations were only discovered by the Board in 1985, in 1983 they existed only as a mere future potentiality. Application of the doctrine of res judicata to the facts of this case is totally improper.

The instant controversy was clearly neither within the contemplation of the parties, nor did the bankruptcy court to include same within the ambit of its 1983 judgment. Applying the doctrine to deny the Board its present day in court would only serve to encourage future litigants to overburden already overworked courts in endless adjudications of series of hypothetical fact situations, by which they would seek to obtain advisory opinions on all potential future occurrences so as to protect their litigation rights against the eventuality that those occurrences might come to pass.

II

THE IMPOSITION OF A USE TAX UPON THE PURCHASER FROM A BANKRUPTCY LIQUIDATION SALE VIOLATES NO PRINCIPLES OF INTERGOVERNMENTAL TAX IMMUNITY

Respondent and amici engage in a lengthy discourse by which they seek to convince the Court that either imposing a use tax upon respondent or making it collect such from its customers is in reality a tax upon the processes of the bankruptcy court itself. After resurrecting and refashioning Justice Marshall's cry that such a "power to tax represents the power to destroy" the integrity of the bankruptcy system, they urge that these taxes are constitutionally barred because they impose various burdens on the bankruptcy system. The arguments are total sophistry, and ignore the fact that the burdens they decry are the constitutionally permissible incidents of our federal system. Moreover, the arguments are a blatant attempt to resurrect the now long discarded theory of "intergovernmental burden". *South Carolina v. Regan*, 465 U.S. 367, 404-417 (1984) (Stevens opinion) (detailing decline of doctrine of intergovernmental burden). Last, the hypertechnical and strained analysis respondent and amici urge upon this Court is totally out of step with the "practical construction" this Court has declared as the proper method of determining claims of intergovernmental immunity. That construction is one which seeks not to unduly impair the taxing of the one entity while respecting the appropriate exercise of the functions by the other. *South Carolina v. Regan, supra* 465 U.S. at 404-417

(Stevens opinion); *Willcuts v. Bunn*, 282 U.S. 216, 229 (1931); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523, 524 (1926); see also, *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279-289 (rejecting formalistic, as opposed to practical construction of state tax laws in determining constitutionality under commerce clause analysis).

Here, the claim is made that a use tax imposed upon respondent and/or its customers is "in lieu of" a sales tax upon the liquidation sale itself, that it is therefore the equivalent of such a tax, and is therefore constitutionally barred. The claim is then made that, if not checked by this Court, such taxes will provide the states the ability to destroy the integrity of the bankruptcy liquidation processes. Conveniently lost sight of in this exposition is the fact that the taxes in question, whether sales or use taxes, are constitutionally nondiscriminatory.[3] Such is felt to be a sufficient prophylaxis against the potentiality of the undue exercise of state power in the fashion herein decried. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 350-351 (Marshall dissent) (rejecting Justice Marshall's statement that the "power to tax involves the power to destroy" as largely a "seductive cliche"); *Graves v. New York ex rel. O'Keefe, supra* 306 U.S. at 489-490 (Frankfurter concurring opinion) (same).

When a private person seeks to clothe himself within a claim of intergovernmental immunity, the limits of same are narrowly construed, for at issue are the fundamental interests of the states in exercising their sovereign rights of taxation, without corresponding benefit to the federal government. *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 352 (1949); *Graves v. New York ex rel. O'Keefe, supra* 306 U.S. at 483. Of course, respondent and amici urge that the interests they seek to protect

---

[3] The Board would note that both its sales and use taxes apply to a myriad of persons and situations, most outside of and having no relation to the bankruptcy context. They are, in essence, "state-wide" taxes imposed generally upon the population of the State. Thus, are definitionally distinguishable from the discriminatory tax imposed directly on the governmental body considered in *McCulloch v. Maryland*, 4 Wheat. 316 (1819). *South Carolina v. Regan, supra* 465 U.S., footnote 2 at 404.

are those of the bankruptcy system itself. Such a contention is belied by the nature of the "use tax" itself, for it is not, as they assert, a "substitute" for a purportedly unconstitutional sales tax on the liquidation sale, but instead a tax complementary to the sales tax, taxing a privilege, the privilege of ownership of the property, which is separate and distinct from, and which arises after the sale itself. *Douglas Aircraft Co., Inc. v. Johnson*, 13 C.2d 545, 551-553, 90 P.2d 313 (1939); see also, *Felt & Tarrant Co. v. Gallagher, supra*, 306 U.S. at 62 (California use tax not violative of commerce clause because incidence fell not upon interstate sale but instead upon purchaser's subsequent intrastate "use"); *Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279, 282 (property sold by federal government to raise revenue not immune from state taxation in hands of buyer even though such taxation may have effect on price government receives at its sale).

Moreover, even disregarding the above, respondent and amici's argument fails for a more basic reason: even if one accepts the use tax as a substitute for the sales tax on the liquidation sale itself, the "practical" legal incidence of the California sales tax has been recognized by this Court not as lying with the seller/retailer (here the estate or trustee) but instead with the purchaser (respondent or its assignor). *Diamond National v. State Equalization Board, supra*, 425 U.S. at 268.

Respondent and amici's arguments concerning the lack of benefits of state taxation to the bankruptcy estate and the burdens imposed by the imposition of these taxes are likewise without merit. State taxes on property and rights of ownership are universally recognized as the appropriate price paid for the protection and services afforded same by the states. *New York v. United States*, 326 U.S. 572, 576-577; *Swarts v. Hammer, supra*, 194 U.S. at 444 (property in bankruptcy estate); *Michigan v. Michigan Trust Co.*, 286 U.S. 334, 344 (1932) (property in federal receivership). Respondent asserts, without elucidation, that a use tax imposed upon property purchased from a bankruptcy liquidation sale, by imposing *a* burden thereon, thereby raises a constitutionally impermissible conflict with the bankruptcy process, citing *International Shoe Corp. v. Pinkus*, 278 U.S. 261 (1929). That citation is totally inapposite and unhelpful, for there concerned

was a state insolvency system which provided discharges to debtors under terms different than federal bankruptcy law. The basic conflict between the two systems was patent, and was a conflict which went to the heart of the bankruptcy system itself, i.e. a uniform system of discharge of debtors. *International Shoe Co. v. Pinkus, supra*, 278 U.S. at 268.

Respondent and amici assert two purported burdens imposed upon the bankruptcy system by the instant taxes: first, the economic incidence of a reduced sale price (or net in sale proceeds) received by the estate after such taxes are imposed; and second, the purported burden thrust upon the trustee in computing and collecting the tax itself. The first burden is constitutionally permissible, and is considered one of the normal incidents of intergovernmental relationships in our federal system. *South Carolina v. Regan, supra* 465 U.S. at 406-413; *Graves v. New York ex rel. O'Keefe, supra* 306 U.S. at 487. The second burden is likewise permissible, for the simple reason that a duty of collection of a state tax is not an unconstitutional burden upon a bankruptcy trustee. *In re Hatfield Construction Co.*, 494 F.2d 1179, 1181 (5th Cir. 1974); *In re Leavy*, 85 F.2d 25, 27 (2d Cir. 1936); also, *Moe & Salish v. Kootenai Tribes*, 425 U.S. 463, 483 (1976) (Indians may be constitutionally compelled to collect sales taxes validly imposed upon non-Indian purchasers from Indian smoke-shops).

The basic policies underlying the bankruptcy system are twofold: the efficient conversion and distribution of the assets of the bankrupt, and the provision to the bankrupt of a "fresh start". *Kokoszka v. Belford*, 417 U.S. 642, 645-646 (1974). The imposition of California's use tax upon the purchaser's privilege of ownership of property acquired from a bankruptcy liquidation sale frustrates neither, for it neither effects the debtor, nor does it impinge on the efficiency of the distribution of his estate. Instead, it merely equalizes the tax burden on that property by requiring that it bear the fair share of the tax burden supporting the state services it receives after leaving the estate. Such equalization is, in fact, fully consonant with the federal bankruptcy system. See *Swarts v. Hammer, supra* 194 U.S. at 444 (stating that conclusion with regard to property actually held in bankruptcy). Respondent and amici's claims that such a tax is constitutionally barred are variously without merit.

III

CONGRESS HAS NOT PREEMPTED STATE TAXATION IN THIS AREA

Amici banks assert that Congress, by enacting § 960, intended to differentiate between liquidation sales and sales in the normal course of business, and by negative implication to continue a purported pre-existing judicially declared bar to state taxation of liquidation sales. Thus, they essentially assert that § 960 evidences Congress' intent to preempt a state's ability to effect any sort of taxation upon a bankruptcy liquidation sale. The argument is misplaced because it misses the mark. There can be no Congressional preemption of the ability of the states to tax a liquidation sale purchaser's use of that property after he receives it from the bankruptcy estate: that "use" is subsequent to and legally severable from the passage of same through the bankruptcy process. *Felt & Tarrant Co. v. Gallagher, supra* 306 U.S. at 67. Amici banks' argument concerning statutory construction and preemption is thus irrelevant to decision of the issues presented herein. Moreover, even if taken on its merits, the argument founders both because it based upon a misperception of fact and a misperception of the applicable standards by which such a preemption claim is gauged.

The general rule is that a state's ability to tax is considered basic to its sovereign powers, and federal preemption thereof will not be implied absent a clear Congressional expression of its intent to do so. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 156 (1973); *Swarts v. Hammer, supra* 194 U.S. at 444. Amici banks' argument that such Congressional intent should be found here centers largely on their contention that in enacting § 960 Congress both meant to therein maintain a distinction between a "liquidating trustee" and a trustee operating or "conducting a business", and to thereby recognize and continue a purportedly extant judicial rule of immunity of bankruptcy liquidation sales from state taxation. The contention is of wholecloth.

The central problem with the entire argument is that its basic premise, i.e. that state taxation of bankruptcy liquidation sales was prohibited as a matter of federal law at the time § 960 was enacted, is simply wrong. In point of fact, the universally applied law at that time, consonant with this Court's holding in *Swarts v. Hammer*, was that the ability of the states to impose taxes upon the property[4] of the bankruptcy estate, whether in reorganization or in liquidation, was presumed: the only question was whether, as a matter of construction of *state* law, the tax was properly applied to the property or transaction in question. See e.g. *Howe v. Atlantic, Pacific & Gulf Oil Co.*, 4 F.Supp. 162, 163 (W.D. Mo. W.D. 1933), rev'd 70 F.2d 360 (8th Cir. 1934) (federal receiver not a person or corporation engaged in business within meaning of Missouri fuel tax statute); also, *In re Mason Tire and Rubber Co.*, 39 F.2d 462, 463-466 (N.D. Ohio E.D. 1930) (finding that proceeds of bankruptcy liquidation sale not immune from liability for Ohio property tax, but that, as a matter of state law, tax not applicable to same); also *In re Fleetwood of Hendersonville Hotel Corporation*, 45 F.2d 670, 671 (4th Cir. 1930) (property held in bankruptcy pending liquidation properly subject to state property taxes during that interim).

The next point advanced by amici banks, to wit: that § 960 was passed by Congress in an attempt to remedy only the "judicially created tax-on-property/tax-on-operations dichotomy to limit state taxation of officials like federal receivers and bankruptcy

---

[4] Respondent asserts, without citation, that prior to § 960, permissible state taxation in the bankruptcy/receivership context was limited solely to property taxes. However, perusal of cases dealing with the question of the applicability of franchise, i.e. excise taxes, belies this assertion. See e.g. *Michigan v. Michigan Trust Co., supra* 286 U.S. at 342 (tax on privilege of exercising corporate franchise appropriately imposed on federal receivership, in that receivership was entity exercising such franchise as a matter of state law); also, *Kansas City, Mo. v. Johnson*, 70 F.2d 360, 361 (8th Cir. 1934) (generally noting confused state of law on state taxation of corporate franchise in federal receiverships and then giving state law a "practical construction" to hold state fuel tax properly imposed upon federal receivership).

trustees" (Brief of amici banks, pages 11-12),[5] while inferably maintaining a further similar dichotomy regarding the taxation of liquidations suffers from the same problem. As demonstrated by review of case law in the area, the problem addressed by Congress lay not in the non-existent "judicially created dichotomy" posited by amici banks, but instead in the fact that federal courts were coming to different interpretations of functionally identical state laws in determining the taxability of estates held in "custodia legis" by the federal courts. See *Michigan v. Michigan Trust Co., supra* 286 U.S. at 341-342; also, *Kansas City, Mo. v. Johnson, supra* 70 F.2d at 361 (overruling *Atlantic, Pacific & Gulf Oil Co., supra*, on the basis that distinction employed as basis for decision therein was "distinction without a difference"). Congress' intent in passing the statute was patent: to irrefutably provide the states with the ability to equalize the tax burden between entities in and outside the "custodia legis" of the federal courts by broadly affirming the state tax liability of bankruptcy and receivership estates, separate and apart from the overly formalistic and confusing constructions of state law previously engaged in by the courts. Such an intent was not unlike that underlying the roughly contemporaneous shift of focus by this Court from a concentration upon "formalisms" to one of "practical construction". *Metcalf & Eddy v. Mitchell, supra* 269 U.S. at 523-524; see also generally, *Complete Auto Transit, Inc. v. Brady, supra* 430 U.S. at 279-289 (tracing repudiation of formalism of rule represented by *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)).

---

[5] Interestingly, amicus cites *Michigan v. Michigan Trust Co., supra*, as standing for the proposition that this court had recognized and applied such a judicial "dichotomy". That case holds however, that the applicability of the franchise tax there in question was one of construction of state, rather than federal law, and holds that that statute, taxing "privilege of exercising its franchise and of transacting its business" was *properly* applied to business activities of federal receiverships in Michigan. In so doing, this Court specifically eschewed engaging in making distinctions between liquidators and receivers, and between diversities of construction of such terms as a "franchise to exist as a corporation" and a franchise "to do" or "transact" business—instead it held that its only duty was to ascertain the meaning of the Michigan statute. *Michigan v. Michigan Trust Co., supra* 286 U.S. at 341-342.

Amici banks urge that Congress, by referring within § 960 to "business" done under the authority of the federal courts, meant to maintain the distinction then existing in bankruptcy law between straight liquidation activities and "carrying on business" under court authorization either within a receivership or by specific order under the predecessor to what is now 11 U.S.C. § 721. No such distinction is in any way apparent from the statute, either at the time of its enactment or at present. As noted in Petitioner's Brief, § 960 in its original form referred specifically to "liquidators" in a completely unqualified manner: the present statute's more generic reference to "officers" subsumes this construction as the shift was meant to effect no substantive change. See generally, Petitioner's Brief, footnote 8 at page 16. Similarly, this Court has recently held that Congress, by using the term "operating trustee" in 28 U.S.C. § 959(b) meant to therein include a liquidating bankruptcy trustee. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 505 (1986). Last, the term "conducting any business", is by its own terms a broad amorphous term which includes any commercial discourse, definitionally including retail sales of all types, including retail sales made in the course of liquidation.[6] (*In re Warmings A.G. Food Center*, 50 B.R. 748, 750-751 (Bky Me. 1985), *aff'd without opinion*, 782 F.2d 1024 (1st Cir. 1985)), and which manifestly "include(s) any activity or operation in connection with the handling and management of the bankrupt estate." *State of Missouri v. Gleick*, 135 F.2d 134, 137 (8th Cir. 1943); *In re Sunrise Construction Co., Inc.*, 39 B.R. 668, 669-670 (D.C. Wyo., 1984); *In re Mid America Co.*, 31 F.Supp. 601, 606 (S.D. Ill. 1939).

---

[6] As noted by Amicus Trustee, not all liquidation sales would constitute a taxable retail sale, for some would be deemed "occasional sales". While the reason such a distinction occurs is not important for the present purposes, the fact that such a distinction is made is, for it demonstrates that it is only liquidation activities which also constitute commercial retail activities, i.e. "business" which would hereby be taxed. Thus, it is not the process of liquidation (in a generic sense) which is the "business" taxed, but instead the discrete sale activity conducted by the liquidator.

Amici banks make various assertions to bolster their contention that § 960's usage of the term "conducting any business" should be given a narrow construction. First, they urge that application of sales and use taxes in the context of liquidation and reorganization sales would not further § 960's purpose of "leveling the commercial playing field". (Brief of amici banks, page 14.) The assertion is pure makeweight, for it is gainsaid that non-bankruptcy California retailers will be proportionately disadvantaged should they have to compete against bankruptcy estates selling like goods ex-tax to California purchasers: either they will have to match the estate's net selling price by making up the difference represented by the tax to the purchaser or they will lose the sale. Similarly, amici banks' contention that the state will lose no revenue if deprived of taxes on property passing through a bankruptcy liquidation sale is a total *ipse dixit*. This state[7] presently loses no such revenue because it is unjustly precluded from equalizing the tax burden on such property. That revenue should never have been denied it in the first instance.

Amici assert that the distinction drawn in 28 U.S.C. § 959(a) between operating and liquidating trustees is a parallel construction which should be accorded weight herein. As shown above, at least for the present purposes, the presence of any such distinction is highly dubious given this Court's holding in *Midlantic National Bank v. New Jersey, supra*. In this regard, the analogy between 28 U.S.C. § 959(b) and § 960 is the apposite one, for both sections are based upon the general Congressional desire to subject receivership and liquidation proceedings to the exercise of the various states' sovereign taxation and police powers, and both are construed *broadly* to give effect to that purpose. *Palmer v. Massachusetts*, 308 U.S. 79, 83-87 (1939); *Swarts v. Hammer, supra*, 194 U.S. at 444. 28 U.S.C. § 959(a), on the other hand, exists as a limited waiver of the general immunity of equity receiverships from suit to permit actions addressing torts committed in furtherance of the debtor's business operations in state courts. As an

---

[7] States in the Second, Fifth, and First Circuits would lose this revenue, as they are presently able to and are receiving same under the authority of *In re Hatfield Construction, Inc., supra, In re Leavy, supra,* and *In re Warmings Food Centers A.G., supra.*

exemption, it is construed *narrowly* so as not to foster interference with the use, control, operation and maintenance of the bankrupt's property. Compare *Barton v. Barbour*, 104 U.S. 126, 133 (1881) (demand against receiver can be laid in outside court only by leave of court appointing receiver); and *Vass v. Conron Bros. Co.*, 59 F.2d 969, 971 (finding predecessor to 28 U.S.C. § 959(a) inapplicable and applying *Barton* rule to bar action brought against bankruptcy trustee for acts in liquidation on basis such suit would essentially concern the distribution of the assets as much as claim against the bankrupt, and should therefore be justiciable only as a claim within the bankruptcy itself); and see *In re American Associated Systems, Inc.*, 373 F.Supp. 977, 979 (Ky. 1974) (applying and stating above). Given the disparity in rules of construction between § 960 and § 959(b) on the one hand and § 959(a) on the other, it is clear that to the extent § 959(a) draws a distinction between operating and liquidating trustees such is not the correct statute from which a parallel construction should be drawn, that parallel instead lying in § 959(b).

Last, amici's contention that Congress meant to preserve the immunity of bankruptcy liquidation sales from state sales taxes by enacting the Code in 1978 without changing § 960 is completely disingenuous. In point of fact, amici banks acknowledge the split of authority in the meaning of § 960's usage of the term "doing business", and additionally improperly cite at least one case, *In re Leavy, supra*, as standing for the opposite proposition from its actual holding. See *In re Leavy, supra* 85 F.2d at 27 (sales tax whose incidence falls on the consumer rather than the trustee as seller is properly imposed upon bankruptcy liquidation sale).

Conversely, a preemption of state taxation of liquidation sales under § 960 would wreak various deleterious effects on the states and would create an unmanageable, unworkable, and internally inconsistant rule. As noted above, such a rule would essentially deprive the States of their ability to equalize the tax burdens among all the property within their borders, by excluding property purchased from bankruptcy estates from taxation, without providing any return relief to the states from having to provide the services that that property will indubitably demand. Similarly, such a rule creates an "uneven playing field" by purposely

creating a tax advantage for bankruptcy liquidation and reorganization sales to the disadvantage of other retailers within the state.

Last, such a rule is impracticable and completely unworkable. The nature of this problem is suggested by amici banks' presence herein: their interest is stated to arise through a "liquidating 11". Yet such an entity is a receivership under any other name, albeit utilized for the purpose of liquidation. As this Court previously noted in *Michigan v. Michigan Trust Co., supra*, proceedings under Chapter 11 are definitionally a reorganization, not a liquidation, even when they ultimately culminate in a liquidation sale. *Michigan v. Michigan Trust Co., supra* 286 U.S. at 345. In practical terms, this juxtaposition of concepts would create a rule which is internally inconsistent. Under same, it would be completely possible for a business to reorganize by liquidating most or all of its tangible assets, and then successfully emerge from "reorganization" as a strengthened commercial entity.[8] While it can, and has been successfully argued that such sales constitute "liquidation" sales, it is also clear that that debtor has continuously engaged in "business", under *any* normal or accepted definition of the word. Under respondent and amicis' rule, it would enjoy a tax benefit its competitors did not enjoy, even though it did not actually undergo a true liquidation.[9] Further, under this rule, the anomaly would exist that that entity would be afforded immunity from state taxes on its reorganizational "liquidation" sales even though it, as a reorganizing entity, clearly falls within the language of § 960. amici bank's argument concerning the purported preemption of state taxation of liquidation sales is thus exposed as based upon, at best, a strained reading of congressional intent by negative inference that would have the

---

[8] An archetypical example of such would be the reorganization of a chain retailer, in which the parent divests itself of most, if not all of its branches, gains strength, and then successfully emerges from the reorganization proceedings.

[9] The fact that such would occur is bespoken by amici banks' rather understated coupling of "reorganization proceedings" with "liquidation sales". Brief of amici banks, at page 14.

ultimate effect of frustrating the Congressional purpose underlying the statute in question.

The doctrine of preemption is read very narrowly where its application would purport to intrude directly on the traditional forms of state actions and powers. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 256 (1984). Thus, the general rule is that congressional attempts to preempt state rights and powers must be directly and clearly stated—in the absence of such a direct and clear statement, preemption will not be found. *Puerto Rico Department of Consumer Affairs v. Isla Petroleum,* ____ U.S. ____, 108 S.Ct. 850, 853 (1988). Here, amici banks seek to read a Congressional intent to preempt state taxation of liquidation estates from a negative inference drawn by innuendo from what is manifestly otherwise a congressional affirmation of the tax liability of bankruptcy estates. However, § 960's silence in this regard, if extent at all, is equally prone to the construction that Congress approved of such taxation (as was otherwise applicable under state law), that it had an inability to agree on the subject, that it was unaware of the problem, or that it was indifferent to same. Such silence is not the "clear expression" of intent to preempt necessary to abridge the state's rights in this area. *Swarts v. Hammer, supra* 194 U.S. at 444. See also, *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S., 94 L.Ed.2d 615, 672, 1473 107 S.Ct. 1442, 1473 (1987) (Scalia dissenting). Given this, preemption should not be found.

Amici banks' attempt to argue preemption based upon the holding of *First Agricultural National Bank v. Tax Commission* is sorely misplaced. Unlike the statute there under consideration, here there is no legislative history of defeat of efforts to allow the states broader taxation powers. Compare, *First Agricultural National Bank v. Tax Commission, supra* 392 U.S. 339 at 341-342. Instead, the only legislative action and debate in this area was a response to immediately alleviate a perceived inability of the states to collect taxes from bankruptcy estates. Similarly, as shown above, there was no prior judicial immunization of these sales from state taxation. Instead, the general rule presumed taxability, with the question solely lying in the construction of state law. See, e.g. *Michigan v. Michigan Trust Co., supra* 286

U.S. at 342. Last, the legal, as opposed to economic incidence of both the California sales tax and California use tax lies not upon the liquidation process or the trustee, but instead upon the private person purchasing therefrom. However, a private purchaser such a respondent enjoys no federal immunity from such taxation. For these reasons, *First Agricultural National Bank v. Tax Commission* simply is not properly applied in determining this case. See *United States v. Mississippi Tax Commission,* 412 U.S. 363, 389 (Douglas dissent).

Respondent and amici banks' argument that § 960 is properly read as preempting state efforts to impose sales and or use taxes either upon bankruptcy liquidation sales or persons purchasing property therefrom are without merit. § 960 is an affirmation of the generally established precept that bankruptcy estates properly bear liability for all applicable state taxes. That section certainly cannot and should not be read as preempting the states' ability to impose non-discriminatory sales and use taxes upon a liquidation sale purchasers' receipt and use of that property after it passes from the bankruptcy estate.

CONCLUSION

For the foregoing reasons, petitioner California State Board of Equalization respectfully requests that the decision below of the Ninth Circuit Court of Appeals be reversed.

Dated: March 31, 1989

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General of the
State of California
ROBERT F. TYLER
Supervising Deputy
Attorney General

Attorneys for Petitioner
California State Board of
Equalization

AMICUS CURIAE

BRIEF

MOTION FILED
JAN 26 1989

No. 88-681

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

v.

SIERRA SUMMIT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

THOMAS D. GOLDBERG
HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-681

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

v.

SIERRA SUMMIT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 36.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amici curiae* in support of petitioner. Petitioner has consented to the filing of this brief; its letter of

consent has been filed with the Clerk. This motion is made necessary because respondent has refused consent.

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The power to raise revenue is an aspect of the inherent sovereignty of state and local governments. This power, moreover, has assumed increasing importance as the federal government has not only ended revenue sharing and grants-in-aid to state and local governments but also looked to state and local governments to shoulder social service programs previously funded by the federal government. Indeed, the struggle of state and local governments for economic solvency and self-sufficiency has never been more difficult than it is today.

This case arises from respondent's effort to avoid the payment of state taxes that are a normal incident to the conduct of its business. California imposes a sales tax on the sale of personal property and a use tax on the rental of property for which a sales tax has not previously been paid. Respondent purchased ski equipment and other property from the bankruptcy estate of China Peak Resort. It paid no sales tax on the transaction because of the Ninth Circuit rule set forth in *California State Board of Equalization v. Goggin*, 191 F.2d 726 (9th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (*"Goggin I"*), and reiterated in *California State Board of Equalization v. Goggin*, 245 F.2d 44 (9th Cir.), *cert. denied*, 353 U.S. 961 (1957) (*"Goggin II"*), which prohibited assessment of any state tax on property sold in liquidation of a bankruptcy estate. Relying on *Goggin II*, the court below held that respondent also was immune from state law requiring it to collect and remit a use tax on the rental of the property. The court reasoned that the tax would not have been assessed but for the immunity from sales tax of the liquidation sale of the property.

The *Goggin* rule upon which the court below relied represents a wholly unwarranted intrusion on and erosion of state taxing power. The decision below and decisions of several courts in other circuits citing *Goggin* have immunized bankruptcy estates from ordinary, nondiscriminatory taxes incident to the sale of property, in violation of this Court's dictate that property of an estate in bankruptcy is subject to all state and local taxes absent a clearly expressed congressional intent to the contrary. *Swarts v. Hammer*, 194 U.S. 441, 444 (1904).

The *Goggin* rule purportedly is predicated on 28 U.S.C. § 960, which provides that business conducted "under authority of a United States court" is "subject to all Federal, State and local taxes applicable to such business." Under any reasonable reading of Section 960, a sale of commercial property is business activity whether or not it is a "liquidation" sale. In *Goggin*, however, the Ninth Circuit adopted a tortured reading of the statute to exclude liquidation sales. Moreover, by inferring preemptive intent because Congress' disavowal of an intent to preempt state taxes did not explicitly mention liquidation sales, the court turned upside down the normal rule that it is the intent to preempt state law—not the absence of preemptive intent—that requires clear expression by Congress. *See R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986), and cases cited therein. The rule is the more egregious because it furthers no federal interest and saves not a dime of federal funds.

Accordingly, *amici* seek leave to file this brief to assist the Court in its resolution of the case.

Respectfully submitted,

THOMAS D. GOLDBERG
HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

January 26, 1989

QUESTION PRESENTED

Whether a State is forbidden by 28 U.S.C. § 960 or the intergovernmental immunity doctrine to assess a nondiscriminatory tax on the sale or use of personal property that has been purchased at a bankruptcy liquidation sale.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF THE CASE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. 28 U.S.C. § 960 DOES NOT EXEMPT A TRUSTEE IN BANKRUPTCY FROM STATE TAXES IN CONNECTION WITH LIQUIDATION SALES BUT, TO THE CONTRARY, EXPLICITLY RECOGNIZES THE TRUSTEE'S DUTY TO PAY SUCH TAXES	6
II. STATE TAXES ON BANKRUPTCY LIQUIDATION SALES ARE NOT BARRED UNDER THE DOCTRINE OF INTERGOVERNMENTAL TAX IMMUNITY	12
A. The Modern Doctrine Of Intergovernmental Tax Immunity Has A Narrow Scope	12
B. The Imposition Of A State Tax On A Bankruptcy Liquidation Sale Does Not Fall Upon The Federal Government	16
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

Alabama v. King & Boozer, 314 U.S. 1 (1941) 13
California Federal Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 6-7
California State Board of Equalization v. Goggin, 191 F.2d 726 (9th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) ..... *passim*
California State Board of Equalization v. Goggin, 245 F.2d 44 (9th Cir.), *cert. denied*, 353 U.S. 961 (1957) ..... *passim*
Davis v. Michigan Dep't of Treasury, 160 Mich. App. 98, 408 N.W.2d 433, *app. denied*, 429 Mich. 854 (1987), *prob. juris. noted*, 108 S. Ct. 2868 (1988) 15
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 7
Graves v. New York ex rel. O'Keefe, 306 U.S. 466 (1939) 13, 14, 16, 17, 18
Henneford v. Silas Mason Co., 300 U.S. 577 (1937) .. 20
Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 9
In re Braniff Airways, Inc., 700 F.2d 935 (5th Cir. 1983) 11
In re Cusato Brothers International, Inc., 750 F.2d 887 (11th Cir.), *cert. denied*, 472 U.S. 1010 (1985) 10, 19
In re Hatfield Construction Co., 494 F.2d 1179 (5th Cir. 1974) 18, 19
In re Hubs Repair Shop, Inc., 28 Bankr. 858 (Bankr. N.D. Iowa 1983) 12
In re Leavy, 85 F.2d 25 (2d Cir. 1936) 18, 19
In re Sunrise Construction Co., 39 Bankr. 668 (D. Wyo. 1984) 12, 18
In re Warmings A.G. Food Center, 50 Bankr. 748 (D. Me.), *aff'd mem.*, 782 F.2d 1024 (1st Cir. 1985) 12, 19
James v. Dravo Contracting Co., 302 U.S. 134 (1937) 13, 19
Jones v. Rath Packing Co., 430 U.S. 519 (1977) 7, 9
Magruder v. Realty Corp., 316 U.S. 69 (1942) 10, 11

TABLE OF AUTHORITIES—Continued

Page

Massachusetts v. United States, 435 U.S. 444 (1978) 17
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 12
Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983) 15
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) .. 16
Missouri v. Gleick, 135 F.2d 134 (8th Cir. 1943) 12, 17
Palmer v. Webster & Atlas National Bank, 312 U.S. 156 (1941) 7, 8, 12
Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 108 S. Ct. 1350 (1988) 9
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 9
R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986) 3, 7
Rockford Life Insurance Co. v. Illinois Dep't of Revenue, 107 S. Ct. 2312 (1987) 3, 14, 17
Stephens Industries, Inc. v. McClung, 789 F.2d 386 (6th Cir. 1986) 11
Swarts v. Hammer, 194 U.S. 441 (1904) ..... *passim*
United States v. County of Fresno, 429 U.S. 452 (1977) 15
United States v. New Mexico, 455 U.S. 720 (1982) .. *passim*
Wardair Canada Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986) 3
Washington v. United States, 460 U.S. 536 (1983) .. 14

CONSTITUTIONAL PROVISIONS:

U.S. Const. Art. I, § 8, cl. 4 6
U.S. Const. Amend. X 3

STATUTES:

Federal:

Bankruptcy Code:

11 U.S.C. § 323(a) 17
11 U.S.C. § 328 17
11 U.S.C. § 330 17

TABLE OF AUTHORITIES—Continued

	Page
11 U.S.C. § 363(b)(1)	11
11 U.S.C. § 363(c)(1)	11
11 U.S.C. § 503(b)	16
11 U.S.C. § 507(a)(1)	16
11 U.S.C. § 704	17
11 U.S.C. § 1101 *et seq.*	2, 11, 17
11 U.S.C. § 1107	17
11 U.S.C. § 1123(a)(5)	11
28 U.S.C. § 124a (superseded 1948)	8
28 U.S.C. § 960	4, 6, 7, 8
Act of June 25, 1948, ch. 646, § 1, 62 Stat. 927 (1948)	8
State:	
Cal. Rev. & Tax. Code § 6006	2
Cal. Rev. & Tax. Code § 6390	2
Cal. Rev. & Tax. Code § 6401	2
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 1138, 73d Cong., 2d Sess. (1934)	8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

No. 88-681

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

v.

SIERRA SUMMIT, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

California, like most States, imposes a sales tax on the sale of tangible personal property. California also imposes a tax on the "use" of personal property, which

includes any lease of property, but exempts from that tax any property on which a sales tax previously has been paid. This case results from California's effort to assess taxes on the sale and lease of personal property formerly owned by a debtor in possession under chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*, and which the debtor sold to a third party in the course of the chapter 11 case.

On December 16, 1981, the debtor, China Peak Resort ("China Peak"), sold ski equipment and other personal property used in connection with a ski resort business to Snow Summit Ski Corporation and its wholly-owned subsidiary, respondent Sierra Summit, Inc. ("Sierra Summit"). The California State Board of Equalization ("the Board") attempted to collect a tax on the sale of the property from the China Peak estate, which under California law had a duty to collect the sales tax from the purchaser and remit it to the State. The bankruptcy court, however, ruled that the estate had no obligation to remit the sales tax because the December 16, 1981, sale of assets constituted a liquidation of the estate, which the State lacked the power to tax under *California State Board of Equalization v. Goggin*, 191 F.2d 726 (9th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (*"Goggin I"*), and *California State Board of Equalization v. Goggin*, 245 F.2d 44 (9th Cir.), *cert. denied*, 353 U.S. 961 (1957) (*"Goggin II"*).

In late 1985 and early 1986, the Board, following an audit of Sierra Summit, determined that Sierra Summit had failed to declare and remit use taxes that should have been charged to customers who rented ski equipment from the resort. Under California law, rentals from tangible personal property are subject to a use tax, unless the lessor previously has paid a sales or use tax based on the purchase price of the property. See Cal. Rev. & Tax. Code §§ 6006, 6390, 6401. Sierra Summit, in an application to the bankruptcy court, argued that

the Board's effort to collect a use tax violated the bankruptcy court's prior order, which had enjoined collection of any tax on the property sold at the liquidation sale. The bankruptcy court denied the application, but the Ninth Circuit Bankruptcy Appellate Panel, in a two-to-one decision, reversed.

The Ninth Circuit affirmed, holding that collection of the use tax was barred by the law of the circuit as set forth in *Goggin II*. Petitioner's suggestion for rehearing en banc, which raised *inter alia* whether the Ninth Circuit should overrule the *Goggin* cases, was denied.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Tenth Amendment preserves the States' power to impose taxes on property within their respective jurisdictions, provided only that a tax may not contravene the federal Constitution or a valid federal statute. Because the States' power to raise revenue by imposing taxes is critical to the functioning of our federal system, this Court consistently has refused to infer limitations on that authority without compelling reason. *See, e.g., Rockford Life Insurance Co. v. Illinois Dep't of Revenue*, 107 S. Ct. 2312 (1987); *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130 (1986); *Wardair Canada Inc. v. Florida Dep't of Revenue*, 477 U.S. 1 (1986).

This case presents an egregious example of a restriction on state taxing power that Congress has not authorized, that deprives the States of revenue for the sole benefit of private interests, and that impedes rather than advances the purposes of the federal bankruptcy laws that purportedly mandate the restriction. The court below, relying on its earlier decisions in *Goggin I* and *Goggin II*, ruled that a State may not assess a nondiscriminatory excise tax on the rental of property pur-

chased at a bankruptcy liquidation sale. In the earlier decisions, the court had reasoned that such taxes are inconsistent with 28 U.S.C. § 960, and also implied that they would violate the doctrine of intergovernmental tax immunity.

The Ninth Circuit's analysis utterly disregards the applicable constitutional principles articulated by this Court. Neither Section 960 nor the intergovernmental immunity doctrine justifies any prohibition on the State's power to tax a bankruptcy liquidation sale, much less the prohibition imposed below on taxes assessed on subsequent purchasers or users of the property long after the liquidation has been completed.

1. The Ninth Circuit has inferred that property sold in a bankruptcy liquidation sale is exempt from state and local taxes under 28 U.S.C. § 960, which provides that a person "conducting any business under authority of a United States court" is "subject to all Federal, State and local taxes applicable to such business." The court reasoned that a liquidation sale is "not made in the course of conducting a business but in the process of putting an end to a business." *Goggin I*, 191 F.2d at 729.

The Ninth Circuit misconstrued Section 960 by distinguishing between liquidation sales and other day-to-day business conducted by a trustee. That distinction ignores the broad sweep of the statutory language. It also contravenes the principle established in *Swarts v. Hammer*, 194 U.S. 441 (1904), that property in bankruptcy is subject to *all* applicable state and local taxes, unless Congress has clearly expressed its intent to create an exemption. Even if the statutory language were ambiguous, there is no evidence that Congress intended Section 960 to create new exemptions from state taxes. To the contrary, the legislative history demonstrates that

Congress intended to ensure that a trustee in bankruptcy would not have an unfair advantage over a person performing similar activity (*e.g.*, liquidating property) outside of bankruptcy.

2. The Ninth Circuit also has attempted to put a constitutional gloss on its decision, indicating that a tax upon a liquidation sale could be viewed as an act that "hinders, delays or burdens" the equitable distribution of a bankrupt's assets to its creditors, and thus "constitutes an unlawful interference with the process of the court of bankruptcy and is invalid." *Goggin II*, 245 F.2d at 46.

The court did not specify the constitutional predicate for this part of its holding, but the only conceivable predicate, the doctrine of intergovernmental tax immunity, has no application here. Taxes imposed on the trustee are paid by the estate, not from the federal treasury. The taxes are, at most, an ordinary cost attendant to liquidation of the estate's assets, and neither hinder the trustee's performance of his duties nor disturb the Bankruptcy Code's scheme of equitable distribution. Indeed, in this case the duty to collect and remit the taxes was imposed on a subsequent purchaser, not the trustee, after the bankruptcy case had been closed.

ARGUMENT

I. 28 U.S.C. § 960 DOES NOT EXEMPT A TRUSTEE IN BANKRUPTCY FROM STATE TAXES IN CONNECTION WITH LIQUIDATION SALES BUT, TO THE CONTRARY, EXPLICITLY RECOGNIZES THE TRUSTEE'S DUTY TO PAY SUCH TAXES.

The leading decision on the interplay between federal bankruptcy law and state taxing power is *Swarts v. Hammer*, 194 U.S. 441 (1904). There, a trustee in bankruptcy argued that Article I, § 8, cl. 4 of the Constitution, which gives Congress the power to establish uniform laws on bankruptcy, precludes the States from assessing taxes upon property in the possession of the trustee. The Court rejected that argument, and held that neither Congress' Article I power to establish uniform bankruptcy laws nor the Bankruptcy Act of 1898 preempted state taxing power. It reasoned that "[t]he question is not the extent of the power of Congress over the subject of bankruptcy, but what Congress intended by the act of 1898." 194 U.S. at 444.

In considering Congress' intent, the Court explained that the transfer of property to a trustee pursuant to the Act conferred on the property "no mysterious or peculiar ownership or qualities," nor did the statute reflect any intent to withdraw the property "from the necessity of protection by the State and municipality or [to] exempt it from its obligations to either." *Id.* The Court went on to state: "If Congress has the power to declare otherwise and wished to do so the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt." *Id.*

Swarts used the same preemption analysis applied in numerous more recent cases. Congress may expressly preempt state law by including preemption language in a statute. *See, e.g., California Federal Savings & Loan*

Ass'n v. Guerra, 479 U.S. 272, 280-81 (1987); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). But where Congress does not include express preemption language, congressional intent to preempt state authority may be inferred only if there are "persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. at 140, *quoting Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

Swarts, of course, established that the former Bankruptcy Act did not preempt state taxes on property in the possession of a bankruptcy trustee.[1] There is no basis for reaching a different result under the Bankruptcy Code, which was enacted in 1978 to supersede the Bankruptcy Act.

Ironically, the only statute that any court has cited to support a tax exemption for property sold in a bankruptcy liquidation sale is 28 U.S.C. § 960, which expressly affirms that trustees and other officers appointed by federal courts are subject to state and local taxes. Section 960 provides:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

As this Court explained in *Palmer v. Webster & Atlas National Bank*, 312 U.S. 156 (1941), the statute was intended "to subject businesses conducted under receivership in Federal courts to State and local taxation the same as if such businesses were being conducted by pri-

---

[1] Indeed, the Court in *Swarts* left open whether Congress has the power to preempt such taxes. As in *Swarts*, there is no reason to reach that issue here because there is no evidence of congressional intent to preempt.

vate individuals or corporations." *Id.* at 163, *quoting*, *e.g.*, H.R. Rep. No. 1138, 73d Cong., 2d Sess. 1 (1934).[2] The Court further noted Congress' conclusion that exempting a federal receiver or trustee from state taxes would provide an unfair "advantage as against his competitors not in receivership" and without good reason would deprive state and local governments of revenue. *Id.*

The *Goggin* decisions construed the phrase "conducting any business" in Section 960 to exclude a liquidation sale, and on that basis invalidated state efforts to assess taxes on such sales. *See, e.g., Goggin I*, 191 F.2d at 730. Contrary to the Ninth Circuit's narrow construction, however, the phrase suggests that Congress intended a broad reading of Section 960. The statute subjects trustees and other officers "conducting *any* business" to "*all* Federal, State and local taxes applicable to such business" (emphasis added). The plain import of the language is that persons are *not* exempt from taxes simply because they are conducting business pursuant to a federal court order. It would be improper to limit the deliberately broad sweep of the statute by construing the term "conducting" as not reaching all activity in connection with the management of a debtor's estate.

---

[2] The Court in *Palmer* addressed 28 U.S.C. § 124a, the predecessor to the current Section 960. Section 124a was enacted in 1934 and contained language similar to the current statute:

> Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by such court to conduct any business, or who does conduct any business, shall . . . be subject to all State and local taxes applicable to such business the same as if such business were conducted by any individual or corporation . . . .

In 1948, as part of a general revision of the Judicial Code, Congress enacted Section 960 to supersede § 124a. The new statute made minor corrections, *e.g.*, to make clear that a trustee is subject to federal as well as state and local taxes, but none of the changes was intended to limit or curtail a trustee's tax liability. See Act of June 25, 1948, ch. 646, § 1, 62 Stat. 927 (1948).

But even if the statutory language were ambiguous, the statute falls far short of the "clear[] express[ion]" of intent necessary to exempt bankruptcy liquidation sales from state and local taxes. *Swarts*, 194 U.S. at 444. Thirty years after *Swarts*, Congress must be presumed to have been aware of its duty to make plain any proposed exemption to state taxes. In any event, the statute was intended not to create exemptions but rather to ensure that a trustee in bankruptcy is subject to the *same* taxes as a person performing the same acts outside of bankruptcy.

Significantly, the *Goggin* cases themselves made no inquiry into the legislative intent—they simply assumed without analysis that conducting a business did not include liquidating the business, and on that basis inferred an intent to preempt despite Congress' silence. *Goggin* thus turned on its head the usual "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 108 S. Ct. 1350, 1353 (1988) (internal quotation marks omitted), *quoting Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985), *quoting Jones v. Rath Packing Co.*, 430 U.S. at 525, *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Viewed in light of the statute's legislative history, moreover, the court of appeals' proposed dichotomy between property sold in liquidation and property sold as part of a going concern is untenable. In this case, the debtor's sale of its ski resort assets to Sierra Summit was a significant and complex business transaction. In that regard, the facts of this case are not unusual. A trustee or debtor in possession engaged in liquidating the debtor's assets often shares many of the attributes of a person managing a business on a day-to-day basis. The person

must evaluate (often with the assistance of professional advisors) potential markets for the assets to be liquidated, determine whether a private sale or public auction is likely to generate the highest price, and either (in the case of a private sale) negotiate the most favorable price or (in the case of a public auction) consider whether minimum bids or other conditions should be imposed. In some cases, the assets may include properties (such as a residential apartment building) that retain their value only if there is no interruption in the provision of services; thus, an agreement to sell assets in a liquidation may even include a requirement that the trustee or debtor properly manage the business on a day-to-day basis until the sale is closed. In other cases, for example, where the debtor's business is the sale of goods, the distinction between sales of inventory in the ordinary course of business and in liquidation is one of degree.[3]

Indeed, the act of liquidating a business at times is indistinguishable from managing the regular business of the debtor. An excellent illustration is *Magruder v. Realty Corp.*, 316 U.S. 69 (1942), in which the Court held that a corporation formed for the sole purpose of liquidating certain railroad properties through foreclosure was "carrying on or doing business" within the

[3] One judge has properly noted this problem:

> Congress knew that a trustee in bankruptcy is often faced with the task of liquidating the business, which involves the disposing of merchandise to those who usually buy such merchandise. Although liquidation sales of inventory by a trustee are terminal, these are the same types of business transactions which the bankrupt company regularly conducted prior to the appointment of a trustee. If a corporation undertakes to liquidate its entire inventory of merchandise and go out of business, it can hardly be said that the corporation was not "conducting its business," even though at the end of the series of transactions the business would be at an end.

In re Cusato Brothers International, Inc., 750 F.2d 887, 891 (11th Cir.) (dissenting opinion), *cert. denied*, 472 U.S. 1010 (1985).

meaning of the federal capital stock tax. *Id.* at 73. Rejecting the argument that the corporation was in a "state of quietude," the Court found that the corporation "was actively engaged in fulfilling the purpose of its creation, the liquidation of its holdings for the best obtainable price." *Id.*

The distinction between liquidating and otherwise conducting the debtor's business also bears little relation to the trustee's or debtor in possession's powers and obligations under federal bankruptcy law, particularly in a chapter 11 reorganization like the one that generated this case. It has become increasingly common for debtors to liquidate through a plan of reorganization under chapter 11.[4] Even in cases where the debtor's assets are not entirely liquidated, substantial portions of a debtor's business or assets may be sold in negotiated transactions in order to finance a plan of reorganization. Court involvement depends to a large extent on whether the transaction is in the ordinary course of business, rather than whether it might be defined as an act of liquidation. In most circumstances, the use, sale, or lease of property in the ordinary course of business does not require court approval (see 11 U.S.C. § 363(c)(1)); the use or sale of property outside the ordinary course of business requires proper notice to interested parties and court approval (see *id.* § 363(b)(1)).

Most important, a reading of "conducting any business" that excludes liquidation sales would create the

[4] A plan of reorganization may provide for the transfer or sale of all or part of the debtor's business or property. See 11 U.S.C. §§ 1123(a)(5)(B), 1123(a)(5)(D). The issue whether certain sales of assets effectively constitute a plan of reorganization subject to the Bankruptcy Code's extensive disclosure and confirmation procedures has generated much litigation. *See, e.g., Stephens Industries, Inc. v. McClung*, 789 F.2d 386, 388-90 (6th Cir. 1986); *In re Braniff Airways, Inc.*, 700 F.2d 935, 939-40 (5th Cir. 1983). Such cases illustrate the difficulty in distinguishing between liquidations and sales of substantial assets that do not constitute liquidating.

very inequity that the statute was designed to prevent: it would favor a federal trustee over an entity liquidating its business outside of bankruptcy. *See Palmer v. Webster & Atlas National Bank*, 312 U.S. at 163; *Missouri v. Gleick*, 135 F.2d 134, 137 (8th Cir. 1943) ("Obviously, if the bankrupts themselves liquidated their respective businesses they would each be liable for contributions with respect to services performed for them in connection with such liquidation.").[5] It also would defeat the statutory purpose by depriving state and local authorities of revenue normally charged on the sale or use of property. Property in bankruptcy continues to obtain the protection of the State and the municipality in which it is situated. *See Swarts*, 194 U.S. at 444. Thus it is just that the bankrupt estate, like any other business, continue to pay its fair share of the cost of the services from which it benefits.

II. STATE TAXES ON BANKRUPTCY LIQUIDATION SALES ARE NOT BARRED UNDER THE DOCTRINE OF INTERGOVERNMENTAL TAX IMMUNITY.

A. The Modern Doctrine Of Intergovernmental Tax Immunity Has A Narrow Scope.

The court below erred not only in its lopsided view of preemption, but also in its apparent reliance on an outmoded concept of the constitutional doctrine of intergovernmental tax immunity. The doctrine of intergovernmental tax immunity derives from *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), where Chief Justice Marshall relied on "generalized notions of federal supremacy" to invalidate a state tax on the National Bank. *See United States v. New Mexico*, 455 U.S.

[5] Other courts have made the same point. *See In re Warmings A.G. Food Center*, 50 Bankr. 748, 751 (D. Me.), *aff'd mem.*, 782 F.2d 1024 (1st Cir. 1985); *In re Sunrise Constr. Co.*, 39 Bankr. 668, 669-70 (D. Wyo. 1984); *In re Hubs Repair Shop, Inc.*, 28 Bankr. 858 (Bankr. N.D. Iowa 1983).

720, 730 (1982). Over the following century, the doctrine was greatly expanded to invalidate a number of state taxes that had indirect and inconsequential effects on the federal government, such as state income taxes as applied to federal employees and even to contractors working on federal projects. "These decisions, it has been said, were increasingly divorced both from the constitutional foundations of the immunity doctrine and from 'the actual workings of our federalism.'" *Id.* at 731, *quoting Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 490 (1939) (Frankfurter, J., concurring).

A series of decisions in the late 1930s and early 1940s halted this expansion and began to return the immunity doctrine to its constitutional roots. For example, in *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), the Court upheld a state tax on the gross receipts of a contractor providing services to the federal government; in *Graves v. New York ex rel. O'Keefe*, it upheld a state tax on the income of an employee of a federal agency; and in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), it upheld a state tax on sales to a federal contractor.

Justice Stone, in *Graves*, explained the concept of federalism that underlies the modern doctrine:

> The theory of the tax immunity of either government, state or national, and its instrumentalities, from taxation by the other, has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other.

306 U.S. at 477-78. The Court emphasized that the immunity "should, as a principle of constitutional construction, be narrowly restricted" (*id.* at 483), and expressed concern that private entities had relied on the doctrine to advance their own interests at the expense of the States (*id.*):

> [T]he expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed.

In holding that the immunity doctrine did not preclude a State from assessing an income tax on the salary of an employee of a federal agency, the Court noted that the tax was imposed on the employee and was paid from the employee's personal funds, not from government funds. 306 U.S. at 480. The Court further rejected the position that immunity could be predicated on indirect and intangible burdens on one government resulting from the tax on its employees by the other government. The Court refused, for example, to assume that the government would bear the economic burden of such a tax indirectly, either on the ground that the tax would be passed on to the employer or that the government otherwise could pay employees a lower salary. *Id.* at 484 n.4. But in any event, any indirect economic burden that a tax may generate "is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power," a burden that the Constitution "presupposes." *Id.* at 487.

In a series of recent decisions, this Court has further narrowed and clarified the intergovernmental immunity doctrine. *See, e.g., Rockford Life Insurance Co. v. Illinois Dep't of Revenue, supra* (allowing state taxes on GNMA mortgage-backed securities even though the obligations under the securities are guaranteed by the federal government); *Washington v. United States*, 460 U.S. 536 (1983) (allowing a state tax on federal contractors with respect to materials purchased for use in federal projects); *United States v. New Mexico, supra* (allowing a state gross receipts tax on federal contractors); *United States v. County of Fresno*, 429 U.S. 452 (1977) (allowing a state tax on federal employees' property interests in housing supplied to them by the federal government as part of their compensation).[6]

In *United States v. New Mexico*, the Court "concluded that the confusing nature of our precedents counsels a return to the underlying constitutional principle" of intergovernmental immunity. 455 U.S. at 733. While a State may not impose a tax directly on the United States, "the limits on the immunity doctrine are, for present purposes, as significant as the rule itself." *Id.* at 734.

First, "immunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." 455 U.S. at 734. "Indeed, immunity cannot be conferred simply because the tax is paid with Government funds." *Id.* at 735. Rather:

> [T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.

Id. The Court believed that this "narrow approach to governmental immunity accords with competing constitutional imperatives, by giving full range to each sovereign's taxing authority." *Id.* at 735-36.

---

[6] The taxes at issue in this case are nondiscriminatory. Thus, cases in which the Court has invalidated state taxes that discriminate against the federal government or its employees are inapplicable here. *See e.g., Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983); *cf. Davis v. Michigan Dep't of Treasury*, 160 Mich. App. 98, 408 N.W.2d 433, *app. denied*, 429 Mich. 854 (1987), *prob. juris. noted*, 108 S. Ct. 2868 (1988) (claim that Michigan income tax unconstitutionally discriminates against retired federal employees).

Second, while recognizing that Congress has some power to expand the narrow constitutional immunity, the Court imposed on Congress the burden to "take responsibility for the decision" by "expressly providing" where certain transactions should be exempt from state tax. 455 U.S. at 737. Echoing the directive in *Swarts*, the Court concluded that "absent congressional action . . . the States' power to tax can be denied only under 'the clearest constitutional mandate.'" *Id.* at 738, *quoting Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976) (plurality opinion).

B. The Imposition Of A State Tax On A Bankruptcy Liquidation Sale Does Not Fall Upon The Federal Government.

Applying these governing principles to this case, it is plain that the intergovernmental immunity doctrine does not justify any restriction on a State's power to impose a nondiscriminatory sales or use tax on property purchased at a bankruptcy liquidation sale. To the contrary, the *Goggin* rule perpetuates the evil identified in *Graves* by authorizing entities to invoke the immunity doctrine in order to advance purely private interests at the expense of traditional state taxing authority. The same result applies whether the duty to pay the tax falls directly on the estate or, as in this case, on subsequent purchasers or users of the property.

1. Any tax imposed on a trustee is an administrative expense of the debtor's estate, payable only from the assets of the estate. See, *e.g.*, 11 U.S.C. §§ 503(b), 507(a)(1) (administrative expenses, which include "the actual, necessary costs and expenses of preserving the estate," are priority claims against the estate). The tax is not collected either from the federal treasury or from federal property.

> By no stretch of the imagination may its collection be held to impose any burden whatsoever upon the United States or to limit or restrict the bankruptcy court as a department of the federal government or the trustee in bankruptcy, as an agent and officer of the court, in the discharge of the duties imposed by the Bankruptcy Act.

Missouri v. Gleick, 135 F.2d at 137. Moreover, a trustee in bankruptcy, though appointed by the court, is not an agent or representative of the federal government, but rather "the representative of the estate" of a debtor under the Bankruptcy Code. 11 U.S.C. § 323(a).[7]

The analysis employed by *Goggin* and similar decisions typifies the unprincipled expansion of the intergovernmental immunity doctrine that the Court discredited in *Graves* and has thoroughly rejected in its recent decisions. The premise of the *Goggin* rule is that tax exemptions for bankruptcy liquidation sales further the purpose of the bankruptcy laws. But it is for Congress, not the courts, to make that determination; "for the political process is 'uniquely adapted to accommodating the competing demands' in this area." *United States v. New Mexico*, 455 U.S. at 738, *quoting Massachusetts v. United States*, 435 U.S. 444, 456 (1978). Because a tax upon the trustee is not a tax upon the federal government, it is sufficient for present purposes that Congress has not displayed a clear intent to exempt trustees from state and local taxes. *See Rockford Life Insurance Co. v. Illinois Dep't of Revenue*, 107 S. Ct. at 2317-18 (declining to infer from congressional silence an exemption for GNMA securities despite argument that such an exemption would further the statutory purpose to facilitate

[7] The trustee's compensation, as well as that of professionals retained to assist him, is paid from the estate (see 11 U.S.C. §§ 328, 330); and his duties are to the estate and its creditors, not to the federal government (see, *e.g.*, *id.* § 704). Indeed, in cases under chapter 11 of the Code, the debtor itself, acting with court approval as a debtor in possession, may manage and even liquidate (through either an approved sale of assets or a plan of reorganization) the estate (see *id.* § 1107). See also page 11 and note 4, *supra*.

financing of private mortgages); *United States v. New Mexico*, 455 U.S. at 737-38.

This case presents an excellent example of the need for a narrow construction of the immunity doctrine and this Court's deference to the political process. The Ninth Circuit's conclusion that a tax imposed on a liquidation sale interferes with the bankruptcy law's "cardinal purpose" to "accomplish equitable distribution of [the debtor's] assets to his creditors" (*Goggin II*, 245 F.2d at 46) is demonstrably wrong. At worst, the tax might reduce the amount paid to the estate.[8] Even assuming that it did so, the equitable distribution of the estate's assets among its creditors would not be affected. The tax would be a necessary expense of administering the estate, just as are the expenses of the trustees or other professionals who participate in the liquidation. The expense is indistinguishable from the numerous other costs, including taxes levied on property in the hands of a bankruptcy trustee before the ultimate liquidation, that are ordinarily attendant to the managing or liquidating of assets. As Judge Augustus Hand stated in *In re Leavy*, 85 F.2d 25, 27 (2d Cir. 1936)[9]:

[8] In fact, the courts have not accepted the proposition that the tax will reduce the sale price. *See, e.g., In re Sunrise Constr. Co.*, 39 Bankr. at 670 (court unpersuaded that purchasers "at any liquidation sale bid any less because they believed a four percent sales tax was being imposed"); *see also Graves v. New York ex rel. O'Keefe*, 306 U.S. at 484 n.4 ("That the economic burden of a tax on salaries is passed on to the employer or that employees will accept a lower government salary because of its tax immunity, are formulas which have not won acceptance by economists and cannot be judicially assumed.").

[9] The court below acknowledged that its holding was inconsistent with *In re Leavy* and *In re Hatfield Constr. Co.*, 494 F.2d 1179 (5th Cir. 1974). It must be noted that *In re Leavy* included *dictum* that a tax imposed directly and primarily on the trustee (as opposed to a tax imposed on a purchaser but which the trustee has a duty to collect and remit) would be an invalid "burden on a governmental instrumentality." 85 F.2d at 27. But that decision preceded *James v. Dravo Contracting Co., supra*, and other cases curtailing the intergovernmental immunity doctrine.

> What the trustee is really complaining of is, not that a burden has been imposed upon the exercise of his functions, but of his inability to sell to a purchaser who would be exempt from a tax and because of such an exemption would pay a higher price to him than would ordinarily be paid for the goods sold. It seems unreasonable to treat the absence of an exemption from taxes as a burden upon the normal exercise of a governmental function.

A clear example of how *Goggin*'s reasoning benefits purely private interests is *In re Cusato Brothers International, Inc.*, 750 F.2d 887 (11th Cir.), *cert. denied*, 472 U.S. 1010 (1985). That case involved Florida's efforts to collect excise taxes from the estate of a beer and wine wholesaler. The Florida excise tax is imposed on manufacturers and distributors of malt beverages and wine, and all taxes are collected from the distributor rather than the retail level. 750 F.2d at 888. The court ruled that the trustee liquidating the debtor's business was a distributor subject to the Florida taxes, but held that the trustee was exempt from such taxes under the "reasoning of *Goggin*." *Id.* at 891. As a result, the court permitted the debtor's entire inventory of beer and wine to be sold at retail without imposition of any tax. The debtor's estate and its creditors, the purchasers of the inventory, the retailers who sold the inventory, and the ultimate consumers in some combination shared the benefit of the judicially created exemption. There was one loser—the State.

Finally, any administrative burden imposed on the trustee to remit the tax is "inconsequential." *In re Warmings A.G. Food Center*, 50 Bankr. at 752; *see also In re Hatfield Construction Co.*, 494 F.2d at 1181. Indeed, the court in *In re Leavy* compared the trustee's

duty to remit taxes on the sale of property to comparable duties to remit taxes on goods purchased from the army, navy, or other government department. 85 F.2d at 26.

2. The decision below is particularly egregious because it extends the immunity inferred for bankruptcy liquidation sales to benefit subsequent purchasers and users of the property long after the debtor's estate has been liquidated and the bankruptcy case closed. The Ninth Circuit has forbidden California to impose a tax not just on a trustee in bankruptcy or one who purchases property from the trustee, but also from any subsequent user of the property where the tax would not be due had a sales tax previously been paid on the liquidation sale. In effect, the court has fastened an immunity to the property itself as it continues through the channels of commerce.[10] Such immunity bears no relation whatever to the principles underlying the Bankruptcy Code.

In this case, the cost to the State mirrored a private benefit allocated among the China Peak estate, the purchaser Sierra Summit, and the ski resort's customers. This inequitable result demonstrates that neither the Bankruptcy Code nor the intergovernmental immunity doctrine requires an exemption from state taxes for property sold at a bankruptcy liquidation sale.

---

[10] The fallacy of the court's reasoning may be illustrated by considering other circumstances in which a use tax would apply because of non-payment of sales tax on the purchase of the property. For example, if Sierra Summit had purchased the property in another State, California could not have imposed a tax on the sale. It could not be argued, however, that imposing a use tax on the property once it was brought into the State would unconstitutionally burden interstate commerce. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

THOMAS D. GOLDBERG
HUGHES HUBBARD & REED
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 626-6200
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
BEATE BLOCH
STATE AND LOCAL LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the Amici Curiae*

January 26, 1989

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-681

In The

Supreme Court of the United States

October Term, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,

Petitioner,

vs.

SIERRA SUMMIT, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF KENNETH L. SPEARS, TRUSTEE, HUGHES DRILLING COMPANY, DEBTOR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

David W. Lee
Counsel of Record

Gregory A. McKenzie
James J. Sykora
McKenzie & Sykora
300 First Oklahoma Tower
210 West Park Avenue
Oklahoma City, OK 73102
(405) 232-3722

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. May state or local governments impose a sales tax on federal bankruptcy liquidation.

2. Are the sales conducted by the bankruptcy trustee while liquidating the debtor's inventory or assets subject to state sales tax.

3. Is a state or local sales tax imposed on the liquidation transaction an impermissible burden on the bankruptcy process.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

CONSENT OF PARTIES 1

STATEMENT OF INTEREST OF AMICUS 2

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. WHEN THE BANKRUPTCY TRUSTEE SEEKS ONLY TO LIQUIDATE THE BANKRUPTCY ESTATE FOR THE BENEFIT OF CREDITORS, AND THE BANKRUPTCY COURT DOES NOT ISSUE AN ORDER AUTHORIZING THE TRUSTEE TO OPERATE THE ESTATE AS A BUSINESS, FEDERAL BANKRUPTCY STATUTES DO NOT PERMIT STATE AND LOCAL TAXATION AUTHORITIES TO IMPOSE A SALES TAX ON THE TRANSACTION THAT CONVERTS THE PROPERTY TO MONEY; FURTHERMORE, A SALES TAX ON THE LIQUIDATION WOULD CONSTITUTE AN IMPERMISSIBLE BURDEN ON THE BANKRUPTCY PROCESS 6

A. The facts in the Trustee's case set forth a typical scenario confronting a bankruptcy trustee if the Ninth Circuit's opinion in the present case is reversed. 6

B. The first and primary duty of the trustee in bankruptcy is to convert the property of the estate to money as expeditiously as possible and the federal statutory bankruptcy scheme does not authorize state and local taxation officials to tax the liquidation transaction .. 7

TABLE OF CONTENTS – Continued

Page

C. A state and local sales tax on the liquidation process hinders this process and frustrates the constitutional and statutory purpose expressed in federal bankruptcy law..... 14

II. REQUIRING THE TRUSTEE IN BANKRUPTCY TO COLLECT STATE AND LOCAL SALES TAXES ON THE SELLING OF THE DEBTOR'S PROPERTY DURING LIQUIDATION WOULD THRUST THE TRUSTEE INTO A MORASS OF LOCAL TAXATION LAW BECAUSE OF THE COMPLEXITIES ASSOCIATED WITH WHETHER THE PROPERTY SHOULD BE SUBJECT TO THESE TAXES 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES:

Boteler v. Ingels, 308 U.S. 57 (1939) 13

Burlington Northern R.R. v. Oklahoma Tax Commission, 481 U.S. 454 (1987) 11

California State Board of Equalization v. Goggin, 191 F.2d 726 (9th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) 15, 18

California State Board of Equalization v. Goggin, 245 F.2d 44 (9th Cir. 1957), *cert. denied*, 353 U.S. 961 (1957) 15, 19

Department of Employment v. United States, 385 U.S. 355 (1966) 21

Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976) 14

Dickinson v. First National Bank, 393 U.S. 409 (1969) 14

Felder v. Casey, 108 S. Ct. 2302 (1988) 22

First Agricultural National Bank of Berkshire County v. State Tax Commission, 392 U.S. 339 (1968) 14

First National Bank v. Anderson, 269 U.S. 341 (1926) 22

Howe v. Atlantic, Pacific & Gulf Oil Co., 4 F. Supp. 162 (W.D. Mo. 1933)..... 12

In re Cusato Brothers International, Inc., 750 F.2d 887 (11th Cir. 1985), *cert. denied*, 472 U.S. 1010 (1985) 15

In re Hatfield Construction Co., 494 F.2d 1179 (5th Cir. 1979) 23

In re Hughes Drilling Co., appeal docketed, No. 88-1557 (10th Cir. Apr. 13, 1988)..... 2

TABLE OF AUTHORITIES – Continued

Page

In re Hughes Drilling Co., 75 Bankr. 196 (W.D. Okla. 1987).....6, 7

In re Klein, 42 U.S. (1 How.) 277 (C.C.D. Mo. 1843) 14

In re New York, New Haven, & Hartford R.R., 360 F. Supp. 1155 (D. Conn. 1973)..... 16

In re Oilfield Instruments, 53 Bankr. 199 (W.D. La. 1985)..... 24

In re Rhea, 17 Bankr. 789 (W.D. Okla. 1982) 16

In re Samoset Associates, 14 Bankr. 408 (D. Me. 1981)..... 16

In re Sheldon's, Inc. v. Maine Bureau of Taxation, 28 Bankr. 568 (D. Me. 1983), *appeal dismissed*, 34 Bankr. 277 (1983).....16, 23

In re Sonner, 53 Bankr. 859 (E.D. Va. 1985) 16

In re Supergate Open Steel Flooring Co., 1 Bankr. 660 (C.D. Cal. 1979) 16

Indian Country v. Oklahoma Tax Commission, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2870 (1988)..... 24

INS v. Cardoza Fonseca, 480 U.S. 421 (1987)..... 12

International Shoe Co. v. Pinkus, 278 U.S. 261 (1929) 18

Kothe v. R. C. Taylor Trust, 280 U.S. 224 (1930)..... 20

Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956) ..18, 22

Midatlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986)..... 17

Nicholas v. United States, 384 U.S. 678 (1966).....17, 19

TABLE OF AUTHORITIES – Continued

Page

Norwest Bank Worthington v. Ahlers, 108 S. Ct. 963 (1988) 20

Palmer v. Webster & Atlas National Bank, 312 U.S. 156 (1941) 12

Perez v. Campbell, 402 U.S. 637 (1971) 18, 24

Railway Labor Executives Association v. Gibbons, 455 U.S. 457 (1982) 14, 15

Schneidewind v. ANR Pipeline Co., 108 S. Ct. 1145 (1988) 22

Swarts v. Hammer, 194 U.S. 441 (1904) 15

United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 108 S. Ct. 626 (1988) 12, 17

United States v. Mississippi Tax Commission, 412 U.S. 363 (1973) 18

United States v. New Mexico, 455 U.S. 720 (1982) 18

United States v. State Board of Equalization, 639 F.2d 458 (9th Cir. 1980) 14

Washington v. United States, 460 U.S. 536 (1983) 24

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. I, § 8, cl. 4 14

STATUTES:

Federal:

11 U.S.C.A. § 346 (West 1979 and Supp. 1988) 11

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C.A. § 362(a) (West 1979 and Supp. 1988) 17

11 U.S.C.A. § 362(d)(1) (West Supp. 1988) 18

11 U.S.C.A. § 363(b)(1) (West Supp. 1988) 7, 8

11 U.S.C.A. § 363(c)(1) (West Supp. 1988) 8

11 U.S.C.A. § 502(f) (West 1979) 8

11 U.S.C.A. § 503(b) (West Supp. 1988) 20

11 U.S.C.A. § 507(a)(7) (West Supp. 1988) 20

11 U.S.C.A. § 507(a)(1) (West 1979) 20

11 U.S.C.A. § 554 (West Supp. 1988) 17

11 U.S.C.A. § 701(1) (West Supp. 1988) 10

11 U.S.C.A. § 704(1) (West Supp. 1988) 7

11 U.S.C.A. § 704(8) (West 1979) 9

11 U.S.C.A. § 721 (West 1979) 6, 8, 10

11 U.S.C.A. § 728(a) (West 1979) 11

11 U.S.C.A. § 1108 (West 1979) 10

28 U.S.C. § 124a (superceded 1948) 12

28 U.S.C.A. § 586 (West Supp. 1988) 21

28 U.S.C.A. § 960 (West 1968) ..... *passim*

Act of June 25, 1948, ch. 646, § 1, 62 Stat. 927 (1948) 10

State:

Cal. Rev. & Tax. Code, § 6367 (West 1987) 23

Cal. Rev. & Tax Code, § 6359.6 (West 1987) 23

TABLE OF AUTHORITIES – Continued

Page

N.Y. Tax Law, § 1105(a) (McKinney 1987) 23

N.Y. Tax Law, § 1115(a)(23) (McKinney 1987) 23

N.Y. Tax Law, § 1132(a) (McKinney 1987) 21

Okla. Stat. Ann. tit. 63, § 1352(I) (West Supp. 1989) 25

Okla. Stat. Ann. tit. 63, § 1354(1)(T) (West Supp. 1989) 23

Okla. Stat. Ann. tit. 68, § 1357(L) (West Supp. 1989) 23

Okla. Stat. Ann. tit. 68, § 1358(C) (West Supp. 1989) 23

Okla. Stat. Ann. tit. 68, § 1361(A) (West Supp. 1989) .21, 25

Okla. Stat. Ann. tit. 68, § 1361(C) (West Supp. 1989) 25

LEGISLATIVE MATERIALS:

78 Cong. Rec. 6656 (1934) 13

H.R. 1138, 73d Cong., 2d Sess. (1934) 12

S. Rep. No. 989, 95th Cong., 2d Sess. 99 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787 11

S. Rep. 1372, 73d Cong., 2d Sess. (1934) 12

OTHER AUTHORITIES:

1 D. Cowans, *Bankruptcy Law and Practice*, § 2.7 at 102 (1987) 10

2 D. Cowans, *Bankruptcy Law and Practice*, § 13.2 (1987) 11

TABLE OF AUTHORITIES – Continued

Page

1 L. King, *Collier on Bankruptcy*, ¶ 8.06 (15th ed. 1988) 20

2 L. King, *Collier on Bankruptcy*, ¶ 363.01 (15th ed. 1988) 9

2 L. King, *Collier on Bankruptcy*, ¶ 363.03 (15th ed. 1988) 7

2 L. King, *Collier on Bankruptcy*, ¶ 363.04 (15th ed. 1988) 9, 10

4 L. King, *Collier on Bankruptcy*, ¶ 704.01[3] (15th ed. 1988) 16

J. MacLachlan, *Bankruptcy*, § 297 at 349 (1956) 15

J. Nowak, R. Rotunda, and J. Young, *Constitutional Law*, § 8.11 (1986) 18

2 State Tax Guide (CCH) ¶ 60-684 (1989) 19

L. Tribe, *American Constitutional Law*, § 5-11 (1988) 14

L. Tribe, *American Constitutional Law*, § 6-29 (1988) 14

L. Tribe, *American Constitutional Law*, § 6-30 (1988) 22

L. Tribe, *American Constitutional Law*, § 6-31 (1988) 21

No. 88-681

In The

Supreme Court of the United States

October Term, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,

Petitioner,

vs.

SIERRA SUMMIT, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF KENNETH L. SPEARS, TRUSTEE, HUGHES DRILLING COMPANY, DEBTOR AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

CONSENT OF PARTIES

Petitioner and respondent have consented to the filing of this brief, *amicus curiae*. A copy of this consent is being filed concurrently with this brief.

STATEMENT OF INTEREST OF AMICUS

This brief, *amicus curiae*, is submitted pursuant to Sup. Ct. R. 36.2, on behalf of Kenneth L. Spears, a bankruptcy trustee appointed to liquidate the assets of a debtor, Hughes Drilling Company, by the United States Bankruptcy Court for the Western District of Oklahoma. This *amicus* brief is submitted in support of the respondent in this case, Sierra Summit, Inc.

Mr. Spears (hereinafter referred to as the "Trustee") has pending, in the United States Court of Appeals for the Tenth Circuit, an appeal of an order of the district court affirming the order of the bankruptcy court. The Trustee's case in the Tenth Circuit, which is styled *In re Hughes Drilling Co., appeal docketed*, No. 88-1557 (10th Cir. Apr. 13, 1988), is an appeal of an order that granted a motion by the Oklahoma Tax Commission to compel the Trustee to collect state sales tax on the Trustee's sale of property of the debtor conducted pursuant to court ordered liquidation of the bankrupt company.

The Trustee has an interest in this case because a decision by the Court will obviously affect the Trustee's appeal in the Tenth Circuit. Also, because the Trustee's case in the Tenth Circuit involves the pure question of whether a state can impose a sales tax on property sold solely to liquidate the bankrupt estate in order to distribute such to the creditors of the debtor, the Trustee believes that this *amicus* brief will aid the Court in assessing what its decision will mean in a context that does not have the abstention and federal anti-injunction act issues that exist in the present case. Furthermore, the issue in *In*

re Hughes Drilling Co. is whether the liquidation transaction itself is directly taxable, and not whether a use tax on personalty that has previously been sold at a liquidation sale is permissible. The former issue is addressed in the brief submitted on behalf of the Petitioner by the *amici* National Governor's Association, et al.

SUMMARY OF ARGUMENT

Allowing state and local taxation authorities to tax the liquidation process imposes an impermissible burden on this important federal transaction. Liquidation is the first duty of a trustee in bankruptcy, and is vital to one of the primary justifications for a system of bankruptcy, that is, the expeditious return of what is left of the debtor's estate to persons and entities such as unpaid wage earners and creditors. When a state or local authority taxes liquidation, it taxes not an item of property, but a federally sanctioned transaction, and by doing so will inevitably obstruct and frustrate the constitutional and statutory bankruptcy scheme.

Pursuant to its constitutional mandate to provide for a uniform system of bankruptcy, Congress has passed a comprehensive statutory system governing the duties of a trustee, which includes the priority by which creditors and other claimants are to be compensated, and how federal and state taxes are to be paid. Nowhere in the Bankruptcy Code is there a provision for payment of a state or local sales tax on the liquidation process itself.

Congress has passed a number of statutes that make clear that the "bright line" for the treatment of a debtor's

estate as a business for a number of purposes is when the court issues an order permitting the trustee to operate the debtor's estate as a business. Unless that is done, the trustee's primary duty under Chapter 7 is to convert the debtor's property to money as expeditiously as possible. Therefore, an attempt by state and local authorities to tax the liquidation transaction, when there is no attempt to operate the debtor's estate as a competing business, is to impede the pervasive and orderly system established by the Bankruptcy Code, and constitutes an uncontemplated and impermissible burden on the trustee.

The plain wording of 28 U.S.C.A. § 960 (West 1968) supports the view that Congress intended that the transfer of personal property of the debtor's estate to money is to be taxed by state and local governments only when the bankruptcy court has determined that the estate is being operated as a business. The legislative history of that statute is consistent with this position.

The bankruptcy function is one that is unquestionably within the federal domain, and the trustee, who acts on behalf of the bankruptcy court, is an instrumentality of the federal government when he or she liquidates the debtor's property pursuant to the court's order. The federal judiciary has always protected activities within this sphere from interference by state regulatory and taxation entities. The ability of the trustee to quickly and efficiently liquidate the debtor's property is obstructed when state and local taxation authorities are allowed to intrude into this process.

Furthermore, a sales tax added to the price the debtor's personal property is sold for at a liquidation sale

means that the property will be more difficult to sell, and will probably reduce what remains to be returned to creditors and unpaid wage earners.

Also, allowing state and local taxing authorities to participate in the division of the debtor's estate at this late stage means that they will move ahead of others who have statutory priority with regard to the bankrupt's assets. This too is inconsistent with the bankruptcy system that governs the distribution of the property among those who have a previous claim to it.

Finally, because of the complexities of state and local sales taxation laws, if a sales tax is imposed on personalty sold during liquidation, many questions will arise as to whether the liquidation sale should fall within one of the many exemptions that exist under state and local sales tax law. In order to properly determine whether the state and local authorities are correct in their attempt to tax the liquidation process, the debtor's estate may be burdened with the additional expense of having to retain a tax expert, and thus further reduce what is to be distributed to the estate's creditors.

ARGUMENT

I. WHEN THE BANKRUPTCY TRUSTEE SEEKS ONLY TO LIQUIDATE THE BANKRUPTCY ESTATE FOR THE BENEFIT OF CREDITORS, AND THE BANKRUPTCY COURT DOES NOT ISSUE AN ORDER AUTHORIZING THE TRUSTEE TO OPERATE THE ESTATE AS A BUSINESS, FEDERAL BANKRUPTCY STATUTES DO NOT PERMIT STATE AND LOCAL TAXATION AUTHORITIES TO IMPOSE A SALES TAX ON THE TRANSACTION THAT CONVERTS THE PROPERTY TO MONEY; FURTHERMORE, A SALES TAX ON THE LIQUIDATION WOULD CONSTITUTE AN IMPERMISSIBLE BURDEN ON THE BANKRUPTCY PROCESS.

A. The facts in the Trustee's case set forth a typical scenario confronting a bankruptcy trustee if the Ninth Circuit's opinion in the present case is reversed.

A brief narration of the facts in the case that has caused the Trustee, Mr. Spears, to file an *amicus* brief in the present case is necessary in order to provide the Court with what the Trustee believes will be a typical experience for a trustee in bankruptcy if the Court rules that a state or local government may tax a Chapter 7 liquidation.

Hughes Drilling Company filed a voluntary petition in bankruptcy under Chapter 7. Mr. Spears ("Trustee") was appointed trustee, and pursuant to his liquidation duties, filed a notice of proposed sale of property. The Trustee never applied for, nor did the bankruptcy court enter, an order granting him the right to operate the business of the debtor pursuant to 11 U.S.C.A. § 721 (West 1979).

Prior to the liquidation sale, the Oklahoma Tax Commission filed a motion to declare the proceeds of the liquidation sale subject to Oklahoma sales tax. The bankruptcy court granted the motion, *see In re Hughes Drilling Co.*, 75 Bankr. 196 (W.D. Okla. 1987), and this order was affirmed in an unpublished opinion by the district court. The Trustee was, therefore, ordered by the bankruptcy court to collect sales tax from the purchasers of the debtor's personal property that was sold during liquidation.

B. The first and primary duty of the trustee in bankruptcy is to convert the property of the estate to money as expeditiously as possible and the federal statutory bankruptcy scheme does not authorize state and local taxation officials to tax the liquidation transaction.

The Trustee contends that the order compelling him to collect sales tax on property sold strictly for liquidation purposes is in violation of the Bankruptcy Code, and is an impermissible burden on the bankruptcy process. It is the first duty of the trustee to "collect and reduce to money the property of the estate for which such trustee serves, and close the estate as expeditiously as is compatible with the best interests of the parties in interest;. . . ." 11 U.S.C.A. § 704(1) (West Supp. 1988). This includes, of course, the power to sell property of the estate. 11 U.S.C.A. § 363(b)(1) (West Supp. 1988). *See also* 2 L. King, *Collier on Bankruptcy*, ¶ 363.03 (15th ed. 1988), which notes that this section applies "when the business is not authorized to be operated or when the business is authorized to be operated and the proposed action is out of the ordinary course of business."

If the trustee, however, wishes to "operate the business of the estate of the debtor for a limited period," he or she must obtain court authorization to do so. 11 U.S.C.A. § 721 (West Supp. 1979). Once this is done, the relevant statute is 28 U.S.C.A. § 960 (West 1968), which states:

> Any officers and agents *conducting any business* under authority of a United States Court shall be subject to all Federal, State, and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

(Emphasis added.)

Whether the trustee is operating the business is the determining factor in other statutes pertaining to bankruptcies that define what the trustee's duties are.[1] *See also*

---

[1] 11 U.S.C.A. § 363(b)(1) (West Supp. 1988) states: "The trustee, after notice and a hearing, may use, sell, or lease, *other than in the ordinary course of business*, property of the estate."

11 U.S.C.A. § 363(c)(1) (West Supp. 1988) states: "*If the business of the debtor is authorized to be operated* under section 721, 1108, 1203, or 1204 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, *in the ordinary course of business*, without notice or a hearing, and may use the property of the estate in the ordinary course of business without notice or a hearing."

11 U.S.C.A. § 502(f) (West 1979) states: "In an involuntary case, a claim arising in the *ordinary course of the debtor's business* or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this

(Continued on following page)

2 L. King, *Collier on Bankruptcy*, ¶ 363.01 (15th ed. 1988) at 363-5 to 363-6 ("bankruptcy sales" are defined as "sales by the trustee in liquidation of the estate and out of the ordinary course of business"). Obviously, the terms concerning the operation of a business during bankruptcy are common and understandable to the bankruptcy court and the trustee in bankruptcy. It would seem to be no accident that the drafters of 28 U.S.C.A. § 960 (West 1968) chose the words "conducting any business" when determining under what circumstances sales of the debtor's property can be taxed.

A reading of the statutes relating to bankruptcy reveals that conducting a business is an entirely different function for a trustee than is liquidation. There is a clear and valid distinction between the sale of assets for liquidation purposes and the sale of assets during the course of business. The latter function requires a court order, and bankruptcy courts and trustees have had little trouble in the past determining when that should be done. *See* 2 L. King, *Collier on Bankruptcy*, ¶ 363.04 (15th ed. 1988).

(Continued from previous page)

section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition."

11 U.S.C.A. § 704(8) (West 1979) states that "*if the business of the debtor is authorized to be operated*" the trustee is to file with the court, the United States trustee "and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the *operation of such business*. . . ." (Emphasis added.)

Before a trustee can operate a business for even a "limited period," a court order is required.[2] 11 U.S.C.A. § 721 (West 1979). No one can seriously argue that "liquidation" and "operate a business" have the same meaning, and the fact that these terms are used in § 721 to refer to different functions supports this view. And if Congress had intended for the liquidation process to be subject to state and local taxation, it could have so stated in 28 U.S.C.A. § 960 (West 1968), particularly in 1948 when the statute was re-codified. *See* Act of June 25, 1948, ch. 646, § 1, 62 Stat. 927 (1948).

Therefore, when a trustee liquidates assets pursuant to 11 U.S.C.A. § 701(1) (West Supp. 1988), he or she is not operating a business. The line is clearly drawn between situations where the trustee is engaged in the liquidation process, as opposed to having to obtain additional court approval to operate the estate as an ongoing business. This "bright line" is an important one to the trustee, who has been given the responsibility of quickly converting the assets of the estate to cash in order to compensate unpaid workers and to satisfy waiting creditors.

Other statutes regarding taxes imposed on the estate also make clear that the burden of a sales tax on the liquidation process was never contemplated by Congress. Although Congress set forth specific statutes governing the collection of several types of federal and state taxes,

---

[2] In a Chapter 11 reorganization, a trustee may operate the debtor's business without a court order. 11 U.S.C.A. § 1108 (West 1979); 2 L. King, *Collier on Bankruptcy*, ¶ 363.04 at 363-23 (15th ed. 1988); 1 D. Cowans, *Bankruptcy Law and Practice*, § 2.7 at 102 (1987).

nowhere is there a mechanism for the collection of state and local sales or excise taxes during liquidation. 11 U.S.C.A. § 346 (West 1979 and Supp. 1988) states that any income of the estate and any State or local tax on or measured by such income shall be computed in the same manner as the income and the tax of an estate. 11 U.S.C.A. § 728(a) (West 1979) states that notwithstanding any State or local law imposing a tax on or measured by income, "the trustee shall make tax returns for the estate of an individual debtor . . . or for a debtor that is a corporation" only if it has net taxable income for the entire period after the order for relief.[3] *See also* 2 D. Cowans, *Bankruptcy Law and Practice*, § 13.2 (1987).

Therefore, despite the existence of numerous statutes pertaining to federal, state and local taxes before, during, and after liquidation, Congress has passed no law authorizing a sales tax on property sold pursuant to a bankruptcy court liquidation order.

The plain wording of 28 U.S.C.A. § 960 (West 1968) supports the view that Congress intended that only when the trustee is "conducting any business" is the conversion of property to money to be taxed by state and local governmental entities. *See Burlington Northern R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987) (" '[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' ").

---

[3] In S. Rep. No. 989, 95th Cong., 2d Sess. 99 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5885, it is noted that this statute applies only to state and local taxation.

The legislative history surrounding § 960 also supports the Trustee's position.[4] In *Palmer v. Webster & Atlas National Bank*, 312 U.S. 156, 163 (1941) the Court noted that the purpose of 28 U.S.C. § 124a (the predecessor of § 960) was to " 'subject businesses conducted under receivership in Federal courts to state and local taxation the same as if such businesses were being conducted by private individuals or corporation,' " quoting H.R. 1138, 73d Cong. 2d Sess. (1934); and S. Rep. 1372, 73d Cong., 2d Sess. (1934). H.R. 1138 and S. Rep. 1372 both refer to the case of *Howe v. Atlantic, Pacific & Gulf Oil Co.*, 4 F. Supp. 162 (W.D. Mo. 1933), and note that this case "recently held that a receiver operating a gasoline-and-oil distributing business was not liable for a sales tax on motor fuel levied by the State of Missouri," causing Missouri and other states to lose thousands of dollars per month. The reports, therefore, complain of business operations, not liquidations.

Perusal of *Howe* itself reveals that the receiver in that case was operating a business "under orders of the court," 4 F. Supp. at 162, suggesting that the receiver had obtained an order to run the business. Therefore, the

---

[4] In *INS v. Cardoza Fonseca*, 480 U.S. 421, 432 n. 12 (1987), the Court stated that if the plain language of the statute appears to settle the question, it will look to legislative history to determine only whether there is "clearly expressed legislative intention" contrary to that language. *See also United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 108 S. Ct. 626, 634 (1988) (both "plain textual indication" and legislative history supported the holding that an unsecured creditor was not entitled to post-petition interest under relevant bankruptcy statutes).

purpose for the enacting of § 960 falls within the theory advanced by the Trustee, that a trustee in bankruptcy should be compelled to collect a sales tax only when the estate is operated as a business, and not during liquidation. *See also Boteler v. Ingels*, 308 U.S. 57, 61 (1939) ("Congress has here with vigor and clarity declared that a trustee and other court appointees *who operate businesses* must do so subject to state taxes 'the same as if such business[es] were conducted by an individual or corporation.' "). (Emphasis added.)[5]

---

[5] The exchange in the House of Representatives during passage of § 124a (now § 960) also supports the view that state taxation was to occur only when the estate was being run as a business:

> MR. TRUAX. I want to ask the gentleman what particular class of people this bill proposed to make subject to taxation?
>
> MR. McKEOWN. A great many receivers in oil cases have been held by the court not liable to pay taxes. They do not pay the gasoline taxes to the State. There are thousands of dollars being lost to the State, because these receivers in gasoline and oil cases are not liable to pay those taxes. In the receivers for bank cases they do not have to pay the taxes to the State.
>
> MR. TRUAX. The bill is to collect taxes from corporations?
>
> MR. McKEOWN. Yes; in cases where there are receivers appointed to run the business.
>
> MR. TRUAX. Well, I am heartily in favor of collecting taxes from corporations. I withdraw my objection.

78 *Cong. Rec.* 6656 (1934).

C. A state and local sales tax on the liquidation process hinders this process and frustrates the constitutional and statutory purpose expressed in federal bankruptcy law.

The federal judiciary has always protected Congress's prerogative when exercised in an area that is universally considered to be the domain of the national government. *See* L. Tribe, *American Constitutional Law*, § 6-29 (1988). In *First Agricultural National Bank of Berkshire County v. State Tax Commission*, 392 U.S. 339 (1968), *Dickinson v. First National Bank*, 393 U.S. 409 (1969), and *Diamond National Corp. v. State Board of Equalization*, 425 U.S. 268 (1976), the Court held that in view of Congress's comprehensive control over the taxing of national banks, states were without power to impose sales or use taxes upon a purchase of tangible personal property by a national bank. *See also United States v. State Board of Equalization*, 639 F.2d 458, 459 (9th Cir. 1980) (states may tax national banks only as specifically permitted by Congress).

Laws pertaining to and affecting bankruptcy especially are thought to be in the realm of national concern. The Constitution grants Congress the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies through the United States; . . . ." *see* U.S. Const. art. I, § 8, cl. 4. This power is plenary and extends to all cases where the law causes to be distributed, the property of the debtor among his creditors. *See Railway Labor Executives Association v. Gibbons*, 455 U.S. 457, 466 (1982); *In re Klein*, 42 U.S. (1 How.) 277 (C.C.D. Mo. 1843); and L. Tribe, *American Constitutional Law*, § 5-11 (1988).

The liquidation power of bankruptcy courts is essential to the distribution of assets and control of the relationship between debtor and creditor. *Railway Labor Executives Association*, 455 U.S. at 466; *California State Board of Equalization v. Goggin*, 191 F.2d 726, 730 (9th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (*Goggin* I). Thus, in the absence of approval by Congress of a sales tax on property sold pursuant to the liquidation process, this burden on the trustee is impermissible.

The court in *Goggin* I noted that while a state may impose a tax upon specific property in the hands of a trustee in bankruptcy, *see Swarts v. Hammer*, 194 U.S. 441 (1904), a sales tax on the "[liquidation] transaction, whatever form it takes, is a tax on the process of the Court liquidating assets in accordance with constitutional power." *Id.* at 730. *See also* J. MacLachlan, *Bankruptcy*, § 297 at 349 (1956) ("Liquidation sales in bankruptcy are not subject to sales taxes, unless the liquidation is accomplished in such a manner that it amounts to carrying on a business [citing *Goggin* I and *Boteler*].").

The Ninth Circuit in *California State Board of Equalization v. Goggin*, 245 F.2d 44, 46-47 (9th Cir. 1957), *cert. denied*, 353 U.S. 961 (1957) (*Goggin* II), amplified the holding in *Goggin* I, stating that since Congress, in enacting 28 U.S.C.A. § 960, had designated sales in the course of operation of a business as the sole area where the state is permitted to impose a tax of any type, "essential sales in liquidation" are to be free from such taxes.

In *In re Cusato Brothers International, Inc.*, 750 F.2d 887, 890-91 (11th Cir. 1985), *cert. denied*, 472 U.S. 1010 (1985), the Eleventh Circuit adopted the analysis of the court in *Goggin* II and held that the trustee who liquidated the

debtor's wine and beer inventory was not "conducting any business" within the contemplation of 28 U.S.C.A. § 960. The court held, therefore, that the liquidation was not subject to state sales tax. Other courts have also adopted the *Goggin* I and II reasoning. *In re Sonner*, 53 Bankr. 859, 867 (E.D. Va. 1985); *In re Sheldon's, Inc. v. Maine Bureau of Taxation*, 28 Bankr. 568 (D. Me. 1983), *appeal dismissed*, 34 Bankr. 277 (1983); *In re Rhea*, 17 Bankr. 789 (W.D. Okla. 1982); *In re Samoset Associates*, 14 Bankr. 408 (D. Me. 1981); *In re Supergate Open Steel Flooring Co.*, 1 Bankr. 660 (C.D. Cal. 1979); and *In re New York, New Haven, & Hartford R.R.*, 360 F. Supp. 1155 (D. Conn. 1973).

The Trustee contends that since the sale of personal property is an essential aspect of liquidation, and the bankruptcy process itself, any burden on or interference with this process infringes upon the constitutionally sanctioned distribution of the debtor's property to those whose toil, property, and trust combined to make the debtor's estate what it was, but who now await only a fraction of what they have put into it. Workers employed by the debtor, secured and unsecured creditors who have contributed their money and property to the debtor's endeavor, and even government entities awaiting payment for previously incurred taxes, are all dependent upon the liquidation process for release of some of what they are owed.[6] To allow the state, and possibly the county and the city, to impose a tax on this federally

[6] 4 L. King, *Collier on Bankruptcy*, ¶ 704.01[3] (15th ed. 1988) notes that "it is the trustee's duty to both the debtor and the creditors to realize from the estate all that is possible for distribution among the creditors . . . ."

mandated transaction is to frustrate and burden an essential aspect of the bankruptcy process.

In *Nicholas v. United States*, 384 U.S. 678, 683 (1966), the Court noted that previous decisions of the Court "reflect the broad equitable principle that creditors shall not be disadvantaged vis-a-vis one another by legal delays attributable solely to the time-consuming procedures inherent in the administration of the bankruptcy laws [footnote omitted]." In *Nicholas*, the Court held that the accumulation of interest on debts and taxes must be suspended once the bankruptcy petition is filed. *Id.* at 682-84. It would be an ironic application of bankruptcy law to hold that interest on past due taxes is not allowed, but that new state and local sales taxes on the liquidation process are permitted.

Furthermore, in *Midatlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 503 (1986), the Court noted that 11 U.S.C.A. § 362(a) (West 1979 and Supp. 1988) (the "automatic stay" provision of the Bankruptcy Code) stays a number of enforcement actions against the estate. One of the provisions prevents "any act to create, perfect, or enforce any lien against property of the estate."[7] *See also United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 108 S. Ct. 626 (1988) (unsecured creditors are not

[7] While *Midatlantic* held that the abandonment power of 11 U.S.C.A. § 554 (West Supp. 1988) did not permit the trustee to abandon property in contravention of state laws designed to protect the public health and safety, the present case is distinguishable since the Trustee seeks only the prevention of a tax on the liquidation process itself.

entitled to compensation under 11 U.S.C.A. § 362(d)(1) (West Supp. 1988) for the delay in foreclosing on their collateral caused by the automatic stay).

Since the sale of property of the estate is essential to the liquidation process, and the sales tax is a tax on the transaction, not the property itself, it is an impermissible burden that has not been authorized by Congress. In *International Shoe Co. v. Pinkus*, 278 U.S. 261, 263-65 (1929) the Court held that the national purpose behind the power of Congress to establish uniformity in bankruptcy law necessarily excludes state regulation. *See also California State Board of Equalization v. Goggin*, 245 F.2d at 46 (*Goggin* II) ("The power of Congress to pass uniform laws in relation to bankruptcies is paramount and supreme under the Federal Constitution.").

The Trustee contends that allowing states to tax the liquidation process frustrates that purpose. *See United States v. New Mexico*, 455 U.S. 720, 735 n. 11 (1982) (state taxes are unconstitutional if they discriminate against the federal government, "or substantially interfere with its activities"); *United States v. Mississippi Tax Commission*, 412 U.S. 363 (1973) (governmental immunity will invalidate a state tax on liquor sold to a federal military installation); *Perez v. Campbell*, 402 U.S. 637 (1971) (state statute requiring state to continue suspension of driver's license for failure to pay automobile-related judgment was unconstitutional because it frustrated federal bankruptcy law); *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189-90 (1956) (subjecting a federal contractor to an Arkansas licensing scheme would give a state licensing board the power to frustrate federal policy); and J. Nowak, R. Rotunda, and J. Young, *Constitutional Law*, § 8.11 at 294

(1986) ("Taxation of state or federal governmental functions by the other could, in some circumstances, violate the doctrine of intergovernmental immunity and disrupt our federal system.").

Obviously, a sales tax on the liquidation process increases the price of the property to be sold, and therefore makes disposal of it more difficult. When one considers that some states and cities have a high combined sales tax[8], this burden is not insignificant. Since there is no reason why the state, the county, and the city cannot each impose a sales tax on the transfer of property during liquidation, the burden to the estate and the bankruptcy trustee is apparent.

The court in *Goggin* II noted that a sales tax on the liquidation process would ultimately be borne by the estate. *Goggin*, 245 F.2d at 45-46. Contemplation of the liquidation sale process supports this belief. A trustee will set a price for the debtor's personalty at a price it will be bought. If a sales tax is added to the price, theoretically the goods will not be sold unless the price of the goods plus the sales tax is lowered to the point where a purchaser will buy the goods. When the price of the goods is lowered to compensate for the addition of the sales tax, this means that a portion of the total selling price of the goods that would normally go to wage earners and other creditors now goes to a state or local taxing authority who is a johnny-come-lately to the process. *Cf. Nicholas v. United States*, 384 U.S. 678 (1966)

---

[8] New York City has a combined state, county, city and transit sales tax rate of 8¼ %. 2 State Tax Guide (CCH) ¶ 60-684 (1989).

(interest on taxes and debts are suspended upon the filing of the bankruptcy petition).

Under 11 U.S.C.A. § 507(a)(7) (West Supp. 1988), even an accrued sales or excise tax is at the lower end of the priority of claims against the bankrupt estate. *See also* 1 L. King, *Collier on Bankruptcy*, ¶ 8.06 (15th ed. 1988). Therefore, a state or local sales tax on the liquidation process means that this tax jumps ahead of the accrued claims listed in § 507(a)(7), which include claims for wages, employee benefits, and income and property taxes.[9] Surely Congress did not intend for a sales tax on the liquidation to take a slice of the pie that was to be split among the wage earners and creditors whose resources are tied up in the debtor's estate and who will receive only a percentage of their contribution. *See Norwest Bank Worthington v. Ahlers*, 108 S. Ct. 963 (1988) (Court insists on strict enforcement of "absolute priority rule" in Chapter 11 reorganizations); and *Kothe v. R. C. Taylor Trust*, 280

---

[9] The *amicus* brief of the National Governor's Association, et al., almost concedes that the sales tax would be borne by the estate ("At worst, the tax might reduce the amount paid to the estate [footnote omitted],"). *Amici* Br. at 18. The *amici* suggest that this money be considered as "a necessary expense of administering the estate." *Id*. Setting aside for a moment the obvious fact that this would mean that the sales tax has no justification for its imposition under the present circumstances, the Trustee contends that the *amici* are attempting to fit this expenditure into 11 U.S.C.A. § 507(a)(1) (West 1979), which means that it would have first priority in claims against the estate, moving ahead of more deserving claims. This argument also ignores the fact that § 507(a)(1) refers to 11 U.S.C.A. § 503(b) (West Supp. 1988), which in turn refers back to the previously mentioned § 507(a)(7), which is at the end of the § 507 priorities.

U.S. 224, 227 (1930) ("The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration.").

The Trustee also contends that when a bankruptcy trustee performs the act of liquidating property pursuant to federal court order, the trustee becomes an instrumentality of the United States government and, therefore, the liquidation transaction cannot be taxed in the absence of Congressional consent. *See Department of Employment v. United States*, 385 U.S. 355 (1966) (American Red Cross is a federal instrumentality immune from Colorado unemployment compensation tax); and L. Tribe, *American Constitutional Law*, § 6-31 (1988).

As noted previously, the duties of a trustee in bankruptcy are comprehensively defined by federal law. The trustee performs a function directly connected to the federal bankruptcy court. Also, the trustee is under the supervision of the United States Trustee, who is under the supervision of the United States Attorney General. 28 U.S.C.A. § 586 (West Supp. 1988). It is hard to imagine a non-federal employee who would be more of an instrumentality of the federal government than the trustee in bankruptcy. The problem demonstrated by the present case becomes especially pronounced when state law, as does Oklahoma's, *see* Okla. Stat. Ann. tit. 68, § 1361(A) (West Supp. 1989), makes the vendor of personal property the "trustee for and on account of this state," and makes the trustee "personally liable for said tax." *See also N.Y. Tax Law*, § 1132(a) (McKinney 1987) ("The tax shall be paid to the person required to collect it as trustee for and on account of the state.").

Since here Congress has not authorized state taxation or regulation of a federal instrumentality, "the possibility of interference with substantive federal policy is sufficient to raise a presumptive of immunity." [footnote omitted] L. Tribe, *American Constitutional Law*, § 6-30 at 512 (1988), citing *First National Bank v. Anderson*, 269 U.S. 341, 347 (1926) (instrumentalities or agencies of the United States created under its law to promote its policies "cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent."). *See also Felder v. Casey*, 108 S. Ct. 2302, 2306 (1988) ("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."); *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145 (1988) (Michigan Public Service Commission's regulation of natural gas companies impinged on field that federal regulatory scheme occupied under Natural Gas Act and state statute seeking to regulate issuance of securities was preempted); and *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187, 189-90 (1956).

II. REQUIRING THE TRUSTEE IN BANKRUPTCY TO COLLECT STATE AND LOCAL SALES TAXES ON THE SELLING OF THE DEBTOR'S PROPERTY DURING LIQUIDATION WOULD THRUST THE TRUSTEE INTO A MORASS OF LOCAL TAXATION LAW BECAUSE OF THE COMPLEXITIES ASSOCIATED WITH WHETHER THE PROPERTY SHOULD BE SUBJECT TO THESE TAXES.

Finally, if the debtor's personalty is subjected to state and local sales and excise taxes during liquidation, many questions will arise concerning whether the property should be subject to the sales or excise tax. For example,

under state sales tax laws, it is common that property that is to be sold for resale is not subject to state sales tax. *See, e.g., N.Y. Tax Law*, § 1105(a) (McKinney 1987) (a sales tax is to be imposed on every "retail" sale of tangible property); and Okla. Stat. Ann. tit. 63, § 1354(1)(T) (West Supp. 1989) (sales for resale are not taxable unless there is a likelihood that the state will lose the tax revenue due to difficulty of enforcement).

Often there is no sales tax for an isolated or "casual" sale. *See Cal. Rev. & Tax. Code*, § 6367 (West 1987) ("occasional" sales exempted); *In re Hatfield Construction Co.*, 494 F.2d 1179, 1180 n. 1 (5th Cir. 1979) (Georgia exempts "casual" sales); and *In re Sheldon's, Inc. v. Maine Bureau of Taxation*, 28 Bankr. 568, 569 (D. Me. 1983) ("casual sales" are not considered sales at retail under Maine law). Sometimes the exemptions are unexpected, *see N.Y. Tax Law*, § 1115(a)(23) (McKinney 1987) (exemption for sale of "used mobile homes"), unusual, *see* Okla. Stat. Ann. tit. 68, § 1358(C) (West Supp. 1989) (sale of baby chicks exempt), or impossibly vague, *see* Okla. Stat. Ann. tit. 68, § 1357(L) (West Supp. 1989) (sale of computers and "related peripherals . . . to a new or expanding business" are exempt).[10]

Therefore, if the debtor's property was to be sold at wholesale rather than retail, or if it falls within one of the

---

[10] California's exemptions from state sales tax include gross receipts from the sale of "noncarbonated and noneffervescent bottled water sold in individual containers of one-half gallon or more in size"), *Cal. Rev. & Tax. Code*, § 6359.6 (West 1987).

numerous and often ill-defined definitions or exemptions, it should be exempt. Thrusting the trustee into the morass of state (and possibly county and city) sales tax law would impose an impermissible burden on the trustee during liquidation. The result will be that in many instances the trustee and the state and local taxing authorities will be at odds as to whether the property is within one of the exempt categories.

It is also foreseeable that in order to properly protect the debtor's property from incorrect taxation, a trustee would have to hire a tax accountant or lawyer, and thus further dissipate the assets of the estate. It is not unheard of for state and local taxing authorities to attempt to tax property when they should not. *See, e.g., Indian Country v. Oklahoma Tax Commission*, 829 F.2d 967, 983-87, *cert. denied*, 108 S. Ct. 2870 (1988) (10th Cir. 1987) (court holds that state sales tax on activities conducted on Indian lands was preempted); and *In re Oilfield Instruments*, 53 Bankr. 199 (W.D. La. 1985) (since under Louisiana law a sheriff conducting a seizure sale was exempt, so should a trustee conducting a liquidation sale).[11] The situation is hardly consistent with the constitutional command requiring uniformity in bankruptcy laws. *See Perez v. Campbell*, 402 U.S. 637, 654-56 (1971).

---

[11] In *Oilfield*, the court applied the test set forth in *Washington v. United States*, 460 U.S. 536 (1983), which requires the court to determine whether state taxes on those who directly deal with the federal government are discriminatory. For the reasons just stated, however, requiring the trustee to make a case-by-case challenge of the state tax in order to determine whether it falls within a state exemption would be an impermissible burden on the liquidation process.

Also, a mistake as to whether sales taxes should be collected may subject the trustee to criminal penalties under state law. *See* Okla. Stat. Ann. tit. 68, § 1361(C) (West Supp. 1989) (vendor who neglects to collect state sales tax is guilty of a misdemeanor). As noted previously, a trustee could also be held civilly liable for failure to collect the tax. Okla. Stat. Ann. tit. 68, § 1361(A) (West Supp. 1988)[12]

CONCLUSION

For the reasons stated, the *amicus* respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

David W. Lee,
Counsel of Record for
the Amicus Curiae

Gregory A. McKenzie
James J. Sykora
McKenzie & Sykora
210 Park Avenue
300 First Oklahoma Tower
Oklahoma City, Oklahoma 73102
(405) 232-3722

February 23, 1989

---

[12] In Oklahoma, a federal trustee in bankruptcy is specifically named as an entity required to collect the state sales tax. Okla. Stat. Ann. tit. 63, 1352(I) (West Supp. 1989).

AMICUS CURIAE

BRIEF

No. 88-681

Supreme Court, U.S.
FILED
[illegible] 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

vs.

SIERRA SUMMIT, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FIRST NATIONAL BANK OF BOSTON AND SECURITY PACIFIC NATIONAL BANK *AS AMICI CURIAE* IN SUPPORT OF RESPONDENT

DANIEL M. GLOSBAND
ANTHONY M. FEEHERRY
JOHN C. ENGLANDER
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, Massachusetts
(617) 549-1000

FREDERICK A. RICHMAN
M. RANDALL OPPENHEIMER
ALAN RADER*
O'MELVENY & MYERS
1800 Century Park East
Suite 600
Los Angeles, CA 90067
(213) 553-6700

Attorneys for Amici Curiae

**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

38 pp

Questions Presented

1. Does the doctrine of res judicata bar a losing party's collateral attack on a final judgment against it through appeal of a contempt order?

2. Does 28 U.S.C. § 960 prohibit the imposition of state sales or use tax on a bankruptcy liquidation transaction?

3. If a long-standing interpretation of federal law as prohibiting the imposition of state sales or use tax on bankruptcy liquidation transactions is reversed, should that change take prospective effect only?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSENT OF PARTIES	1
STATEMENT OF INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I	
REVIEW OF THE 1983 BANKRUPTCY COURT INJUNCTIVE JUDGMENT AGAINST PETITIONER IS BARRED BY RES JUDICATA	3
A. Res Judicata Bars Consideration Of The Merits Of Petitioner's Case	4
B. The Only Issue Properly Before The Court Is The Application Of The 1983 Judgment To The Facts	7
II	
FEDERAL BANKRUPTCY SYSTEM DOES NOT ALLOW THE STATES TO IMPOSE SALES OR USE TAXES ON A COURT APPROVED BANKRUPTCY LIQUIDATION SALE	9
A. Congress' Intent In 1934 When It Enacted 28 U.S.C. § 960 Was To Codify Existing Restrictions On Taxation Of Bankruptcy Trustee Operations, With The Exception Of A Trustee's Conduct Of Business With Estate Resources Pending A Liquidation Sale	9
1. The Effect Of The Intergovernmental Tax Immunity Doctrine On Congress' Drafting Of 28 U.S.C. § 960	10
2. Congress Employed Distinctions Similar To That In § 960 For Similar Purposes In Other Legislation Concerning Bankruptcy	14

TABLE OF CONTENTS

	Page
3. The Principles Of Legislative Interpretation Established By This Court Support The Conclusion That 28 U.S.C. § 960 Bars State Sales Tax On A Bankruptcy Liquidation Sale	16
B. Congress Did Not Alter The Bar On The Imposition Of State Sales Tax On Bankruptcy Liquidation Sales When It Conducted A Complete Revision Of The Federal Bankruptcy Laws In 1978	18
C. The Imposition Of A Use Tax, In Lieu Of Collecting Sales Tax From The Bankruptcy Trustee, Contravenes Congress' Intent That Bankruptcy Liquidation Sales Be Free Of State Taxation	20
III	
ANY DECISION TO REVERSE THE *GOGGIN* RULE SHOULD APPLY ONLY PROSPECTIVELY	22
A. This Court Has Recognized That Decisions Which Set Forth New Rules Of Law Should Not Apply Retroactively If Such Application Would Upset The Justifiable Reliance Of Those Who Acted Under The Old Rule	23
B. Application Of The Chevron Test Demonstrates That Any Break With Goggin Should Apply Only Prospectively	24
CONCLUSION	27

TABLE OF AUTHORITIES

Cases

	Page
American Trucking Associations, Inc. v. Scheiner, 483 U.S. 266 (1987)	23
American Trucking Associations, Inc. v. Smith, No. 88-325	23
California Pea Products Inc., In Re, 37 F.Supp. 658 (S.D. Cal. 1941)	19
California State Board of Equalization v. Goggin, 191 F.2d 726 (9th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952) (*"Goggin I"*)	*passim*
California State Board of Equalization v. Goggin, 245 F.2d 44 (9th Cir.), *cert. denied*, 353 U.S. 961 (1957) (*"Goggin II"*)	*passim*
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	23, 24, 26, 27
China Peak Resort, In Re, 847 F.2d 570 (9th Cir. 1988)	5
Cusato Bros. International, Inc., In Re, 750 F.2d 887 (11th Cir.), *cert. denied*, 472 U.S. 1010 (1985)	25
Detroit v. Murray Corp., 355 U.S. 489 (1958)	22
Dobbins v. Commissioners of Erie County, 16 Pet. 435 (1842)	11
Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	5, 8
First Agricultural Nat. Bank v. State Tax Commission, 392 U.S. 339 (1968)	16, 17
Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955)	7
Gene Adams Funeral Service, Inc., In Re, CCH Bk. L. Rep. No. 162, p. 33 (W.D. Okla. 1970)	19

TABLE OF AUTHORITIES

CASES

	Page
Gillespie v. Oklahoma, 257 U.S. 501 (1922)	11
Hanover National Bank v. Moyses, 186 U.S. 181 (1902)	9, 14
Hatfield Construction Co., In Re, 494 F.2d 1179 (5th Cir. 1974)	19
Howe v. Atlantic, Pacific & Gulf Oil Co., 4 F.Supp. 162 (W.D. Mo. 1933), *rev'd Kansas City v. Johnson*, 70 F.2d 360 (8th Cir.), *cert. denied* 293 U.S. 617 (1934)	12
Insurance Corp. of Ireland v. Compagnie Des Bauxtes De Guinea, 456 U.S. 691 (1982)	7
James v. Dravo Contracting Co., 302 U.S. 134 (1937)	11, 16
Kelly v. Robinson, 479 U.S. 36 (1986)	20
Leavy, In Re, 85 F.2d 25 (2nd Cir. 1936)	19
Maggio v. Zeitz, 333 U.S. 56, 68 S. Ct. 401 (1948)	5, 6
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, No. 88-192	23
M'Culloch v. Maryland, 4 Wheat. 316 (1819)	9, 16, 17
Michigan v. Michigan Trust Co., 286 U.S. 334 (1932)	11, 12
Mid America Co., In Re 31 F.Supp. 601 (S.D. Ill., 1939)	19
Midlantic Nat. Bank v. New Jersey D.E.P., 474 U.S. 494 (1986)	11, 17, 18
New York, New Haven and Hartford R.R. Co., In Re, 360 F.Supp. 1155 (D.Ct. 1973)	19

TABLE OF AUTHORITIES

CASES

	Page
Northern Pipeline Construction Co. v. Marathon Pipeline Co., 468 U.S. 50 (1982)	23, 26
Shea v. Louisiana, 470 U.S. 51 (1985)	23
Sheet Metal Workers v. EEOC, 478 U.S. 421, 441 n. 21, 106 S. Ct. 3019 (1986)	6
State Board of Equalization v. Boteler, 131 F.2d 386 (9th Cir. 1942)	19
State of Missouri v. Gleick, 135 F.2d 134 (8th Cir. 1943)	19
Solem v. Stumes, 465 U.S. 638 (1984)	23, 24, 25
Swarts v. Hammer, 194 U.S. 441 (1904)	11
The Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959)	8
Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Association, 455 U.S. 691, 705, 102 S. Ct. 1357 (1982)	7
Union P.R. Co. v. Peniston, 85 U.S. 5 (1873)	11
United States v. Johnson, 457 U.S. 537 (1982)	23
United States v. New Mexico, 455 U.S. 720 (1982)	21
United States v. Rylander, 460 U.S. 752 (1983)	6, 7
United States v. Thompson, 319 F.2d 665 (2d Cir. 1963)	7
United States v. United Mine Workers of America, 330 U.S. 258 (1947)	6, 7
United States v. Whitridge, 231 U.S. 144 (1913)	11
Vass v. Conron Bros. Co., 59 F.2d 969 (2d Cir. 1932)	15

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS:

STATUTES:

	Page
Federal:	
Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544 (1898)	9
Bankruptcy Act of 1898, § 2(5) formerly 11 U.S.C. § 11	13, 15
Bankruptcy Act of 1898, § 48	12
Bankruptcy Act of 1898, §§ 189, 343 and 445	13
Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)	9
11 U.S.C. § 105	8
11 U.S.C. § 554(a)	17
28 U.S.C. § 124a	2, 10
28 U.S.C. § 959(a), formerly 28 U.S.C. § 125	14, 15
28 U.S.C. § 960	*passim*
LEGISLATIVE MATERIALS:	
H.R. Rep. No. 1138, 73d Cong., 2d Sess. (1934)	12
78 Congressional Record 6656 (1934)	9
124 Cong. Rec. H. 11114-11115 (1978)	17
S. Rep. No. 1372, 73rd Cong., 2d Sess. (1934)	12, 14, 18
Senate Report No. 95-989	18

TABLE OF AUTHORITIES

Miscellaneous:

Page

Sales Tax Counsel Ruling
198.0020 (1983) 25, 26
198.0080 (1957) 25, 26

PUBLICATIONS:

Confusion in Federal Courts: Application of the Chevron Test In Retroactive- Prospective Decisions, 33 Ill. L. Rev. 117, 129 (1985) 24

4A *Collier on Bankruptcy* ¶ 70.97[4] 19

Paskay, *Handbook for Trustees and Receivers in Bankruptcy* § 15.006[5] (1968) 19

Note, *Bankruptcy Sale As A Judicial Sale Free From Taxation*, 1 Journal of Public Law 504 (1952) ... 19

MacLachlan, *Bankruptcy* 349 (1956) 19

No. 88-681

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

CALIFORNIA STATE BOARD OF EQUALIZATION,
Petitioner,

vs.

SIERRA SUMMIT, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FIRST NATIONAL BANK OF BOSTON AND SECURITY PACIFIC NATIONAL BANK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

CONSENT OF PARTIES

Petitioner and respondent have both consented to the filing of this *amici curiae* brief. These consents are being filed concurrently with this brief.

STATEMENT OF INTEREST OF AMICI

Amici, The First National Bank of Boston and Security Pacific National Bank, are former secured creditors of a California cable television company which filed a Chapter

11 petition for bankruptcy in 1985. They participated in the formulation of a complicated plan of reorganization which hinged on a court-approved liquidation sale of the assets of the debtor to another cable television entity. Amici may be affected by a decision of the Court in this case in that petitioner has asserted an entitlement to collect sales tax on that liquidation sale. The contracts upon which the reorganization plan was based could require amici to reimburse the purchaser for a significant portion of any such tax.

SUMMARY OF ARGUMENT

Petitioner is barred by the doctrine of res judicata from collaterally attacking, on this appeal from a contempt order, the Bankruptcy Court's 1983 judgment. That final judgment was never appealed. Petitioner was party to the original Bankruptcy Court proceeding and the judgment issued against Petitioner is not now subject to question as to the court's jurisdiction or as to the merits of its decision. The only question properly before this Court is a very narrow one: the application of the specific order issued by the Bankruptcy Court to the specific circumstances of the Sierra Summit ski rental business. For that reason, amici respectfully suggest the Court reconsider its grant of certiorari.

If the Court determines it appropriate to consider the merits of the Ninth Circuit's *Goggin* decisions on this record, those decisions should be upheld based upon the Congressional intent expressed in 28 U.S.C. § 960. When in 1934 Congress enacted the predecessor to 28 U.S.C. § 960 (28 U.S.C. § 124a), it codified existing law restricting the imposition of state sales tax on bankruptcy liquidation sales. Forty-four years later, when Congress enacted a comprehensive revision of federal bankruptcy

law through the Bankruptcy Code of 1978, it chose to continue the policies originally codified in § 960.

Whether the state imposes a sales tax on the trustee (or debtor in possession) liquidating the estate, or a use tax on the purchaser of the estate's property, the practical economic result is identical. Congress understood its enactment of 28 U.S.C. § 960 to result in the protection of the bankruptcy estate from the state taxation on the estate's liquidation and disbursement to creditors. This Court should uphold the Ninth Circuit's decisions effectuating the Congressional intent by looking past the manner in which the state assessed its tax to the manner in which the tax affected the bankruptcy estate.

Finally, if the Court decides to reverse the long-standing protection from state taxation of bankruptcy liquidation transactions afforded by the Ninth Circuit's decisions, that change should be given prospective effect only. A ruling by this Court that bankruptcy liquidation sales are subject to California state sales or use tax will overule long-standing legal precedent, and would work considerable inequity on those who relied upon existing declarations of law by both the Ninth Circuit and petitioner itself in its Sales Tax Counsel Rulings.

ARGUMENT

I.

REVIEW OF THE 1983 BANKRUPTCY COURT INJUNCTIVE JUDGMENT AGAINST PETITIONER IS BARRED BY RES JUDICATA.

In the first sentence of its argument petitioner State Board of Equalization ("Board") states that the issue in this proceeding is "the validity of a ruling by the Ninth Circuit Court of Appeals, *California State Board of Equal*

ization v. Goggin, 245 F.2d 44 (9th Cir., 1957)".[1] Petitioner's Brief on the Merits, at 13. Petitioner is wrong. It lost the opportunity to obtain this Court's review of *Goggin II,* as applied to the facts of this case, when it chose not to appeal the judgment issued against it in this case by the Bankruptcy Court in 1983. Review of the Statement of the Case in the Board's brief demonstrates that the Board, by its own choice, is barred from challenging in this proceeding the wisdom of either of the *Goggin* decisions.

A. Res Judicata Bars Consideration Of The Merits of Petitioner's Case.

In 1983 the bankruptcy trustee filed an adversary proceeding against the Board challenging the assessment of a sales tax on the liquidation sale of the debtor's assets. Petitioner's Brief on the Merits, at 6. "After briefing by both parties" the Bankruptcy Court determined that the tax was barred by *Goggin II* and issued a judgment against the Board. *Id.* The Bankruptcy Court judgment "prohibited the Board from 'assess[ing] or enforc[ing] a sales or other tax against the [trustee], China Peak, its principals or other parties by reason of the sale of the assets of China Peak Resort, Ltd. to Snow Summit . . ." *Id.* The Board did not appeal from the 1983 judgment.

Accordingly, when the time for appeal ran later that year, the Bankruptcy Court judgment became res judicata

---

[1]Hereinafter the Ninth Circuit's decision in *California State Board of Equalization v. Goggin,* 191 F.2d 726 (9th Cir. 1951), *cert. denied,* 342 U.S. 909 (1952), will be referred to as *"Goggin I"* and the decision in *California State Board of Equalization v. Goggin,* 245 F.2d 44 (9th Cir. 1957), *cert. denied,* 353 U.S. 961 (1957), will be referred to as *"Goggin II"*.

as to the Board. *Federated Dept. Stores v. Moitie,* 452 U.S. 394, 398 (1981):

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action . . . Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.

When the Board decided to appeal it lost any opportunity to contest the wisdom of the Bankruptcy Court's application of *Goggin II* to the facts before it or the wisdom of the *Goggin II* decision itself. As the Ninth Circuit succintly put it: "[a]ny objection the Board might have made to the original order is too late." *In re China Peak Resort,* 847 F.2d 570, 572 (9th Cir. 1988).

The Board appealed instead from an order issued by the Bankruptcy Appellate Panel in 1987, holding it in contempt of the Bankruptcy Court's original 1983 judgment for assessing a use tax against respondent Sierra Summit. Petitioner's Brief on the Merits, at 8-9. The Board lost that appeal in the Ninth Circuit, *In re China Peak Resort, supra,* and has now brought before this Court its objections to the Ninth Circuit's *Goggin* decisions. But those objections cannot be heard. The most fundamental principles of appellate jurisprudence bar the Board from contesting a contempt citation by arguing, after a judgment against it has become final, that the trial court wrongly decided the case or relied on precedents which should be overturned.

The Court addressed this very situation in *Maggio v. Zeitz,* 333 U.S. 56 (1948), a bankruptcy proceeding in

which the losing party attempted to challenge the legal merits of the decision he violated on appeal from a contempt order. The Court refused to allow this procedure because "when completed and terminated in a final order, [the decision] becomes res judicata and not subject to collateral attack in the contempt proceedings." *Id. at 68.* The Court explained that:

> [i]t would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. . . . when [an order] has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have been issued in the first place. United States v. United Mine Workers, 330 US 258 . . . *Id. 69. See also Sheet Metal Workers v. EEOC*, 478 U.S. 421, 441 n. 21 (1986); *U.S. v. Rylander*, 460 U.S. 752, 756 (1983).

The Board nevertheless argues that it is free to contest at any time, through appeal of a contempt order, the jurisdiction of the court issuing the underlying judgment against it. In support of this proposition the Board cites the *United States v. United Mine Workers* decision relied on by the Court in the passage quoted above from the *Maggio* case. Petitioner's Brief on the Merits, at 31.

The Board's argument and its citation are unavailing. This Court has provided definitive guidance on the application of res judicata to jurisdictional issues for those, like the Board, who were party to the original action:

> A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon

> an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations — both subject matter and personal. *Insurance Corp. of Ireland v. Compagnie Des Bauxtes de Guinea*, 456 U.S. 694, 702 n. 9 (1982). *See U.S. v. Rylander*, 460 U.S. 752, 756-757 (1983). *Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Association*, 455 U.S. 691, 705 (1982).

The Board's reliance on *United Mine Workers* is misplaced.[2] That case involved an appeal from a finding of contempt of a temporary restraining order and preliminary injunction. *United States v. United Mine Workers*, 330 U.S. 292. Far from holding that a final judgment can be collaterally attacked by the losing party, the Court held that, pending a decision on the question of jurisdiction, a court has the power to maintain the status quo and punish violations as contempt, and that an order issued by a court with jurisdiction must be obeyed until it is reversed by "orderly and proper proceedings." *Id.* at 294.

B. The Only Issue Properly Before The Court Is the Application of the 1983 Judgment To the Facts

The jurisdiction of the Bankruptcy Appellate Panel to order the issuance of a contempt citation in 1987 is not properly before this Court. All that is at issue is the Appellate Panel's decision, upheld by the Ninth Circuit, that the collection of a use tax from respondent Sierra

---

[2] *United Mine Workers* is the only decision of this court cited by the Board. The Board cites two lower court decisions, but neither supports its contentions. *Fong Sik Leung v. Dulles*, 226 F.2d 74 (9th Cir. 1955); *U.S. v. Thompson*, 319 F.2d 665 (2d Cir. 1963). Both cases involve attacks on contempt citations by persons who were not party to the underlying action. Neither support collateral attack of a final judgment by the losing party.

Summit falls within the terms of the original Bankruptcy Court injunctive judgment.

If the Board's assessment against Sierra Summit is, in the terms of the original judgment, "a sales or other tax by reason of the sale", then the Bankruptcy Appellate Panel was simply exercising the power granted by 11 U.S.C. § 105 to enforce existing orders.[3] In that event, the Board's arguments concerning the Anti-Tax Injunction Act and the Bankruptcy Court's "related to" jurisdiction would have been as apt when the injunction was issued as they may be now — and are barred by res judicata. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. at 398. If, on the other hand, the original judgment does not extend by its terms to the Board's assessment against Sierra Summit, the Board's new jurisdictional arguments are superfluous.

The only issue properly before the Court is a narrow factual question concerning the interpretation of a Bankruptcy Court order. Amici respectfully suggest that the Court therefore reconsider its grant of certiorari. *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959) ("Examination of a case on the merits . . . may bring into 'proper focus' a consideration which, though present in the record at the time of granting the writ, only later indicates that the grant was improper.")

---

[3]The Appellate Panel explicitly rested its jurisdiction on 11 U.S.C. § 105. Petitioner's Brief on the Merits, at 9.

II.

THE FEDERAL BANKRUPTCY SYSTEM DOES NOT ALLOW THE STATES TO IMPOSE SALES OR USE TAXES ON A COURT APPROVED BANKRUPTCY LIQUIDATION SALE.

A. Congress' Intent In 1934 When It Enacted 28 U.S.C. § 960 Was To Codify Existing Restrictions On Taxation Of Bankruptcy Trustee Operations, With The Exception Of A Trustee's Conduct Of Business With Estate Assets Pending A Liquidation Sale.

If the court addresses the merits of the *Goggin* decisions, it should uphold those decisions as the correct interpretation of 28 U.S.C. § 960. When Congress enacted that section in 1934, it intended to codify existing restrictions on taxation of bankruptcy trustees while providing only a limited exception for taxing a trustee's conduct of business pending a liquidation sale.

Congress took up the subject of the appropriate limit on state taxation of the activities of federal receivers and bankruptcy trustees in 1934 in response to federal court decisions holding that receivers were not liable to pay taxes to the States. 78 Congressional Record 6656 (1934). Congress addressed this subject against the backdrop of an extensive body of judicial and legislative activity. The Bankruptcy Act of 1898, Ch. 541, 30 Stat. 544 (1898) (superceded by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978)), created an extensive network of provisions balancing the competing interests of debtors, creditors, the public and various taxing authorities. *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902). In addition, this Court, in the century since *M'Culloch v. Maryland*, 4 Wheat 316 (1819), had

articulated its own extensive set of rules — under the rubric of the intergovernmental tax immunity doctrine — restricting the states' power to impose taxes on federal officials such as receivers and trustees.

The legislation Congress enacted — 28 U.S.C. § 960 (then 28 U.S.C. § 124a)[4] — harmonized the intergovernmental tax immunity many courts had extended to such officials with the protections — and exposures — they received under existing legislation. This was accomplished by conditioning their tax liability on the distinction drawn in both the Bankruptcy Act of 1898 and Title 28 of the United States Code between trustee activity effectuating the liquidating function of the bankruptcy process and trustee activity merely mirroring that of any businessman. In enacting § 960 Congress codified the portion of the intergovernmental tax immunity doctrine it approved — affording protection to the liquidating or plan-effectuating activities of a trustee — while abrogating the portion of that doctrine it disapproved — protection to activity in the ordinary conduct of business.

1. The Effect Of The Intergovernmental Tax Immunity Doctrine On Congress' Drafting Of 28 U.S.C. § 960.

Whatever the current status of the intergovernmental tax immunity doctrine, there can be no disagreement concerning the doctrine's standing in 1934 when § 960

---

[4]The relevant portion of 28 U.S.C. Section 124a, as enacted in 1934, states as follows:

> Any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation . . .

was enacted. This was the doctrine's high water mark. *E.g. Dobbins v. Commissioners of Erie County*, 16 Pet. 435 (1842) (state tax on income of federal employee is unconstitutional); *Gillespie v. Oklahoma*, 257 U.S. 501 (1922) (state income tax on income derived from property leased from Federal Government is unconstitutional). The beginning of the Court's reassessment of that doctrine, in *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), was still three years off.

In applying the intergovernmental tax immunity doctrine to persons like trustees and receivers who participated in a federal function, this Court drew a distinction between state taxation of property under their supervision and state taxation of their activities with that property. Taxation of property in the hands of a trustee or receiver was permissible. *Swarts v. Hammer*, 194 U.S. 441 (1904) (bankruptcy trustee must pay property tax on the estate's property under his control). However, a "tax upon the operations of the agent acting for the government" was not permissible. *Union P.R. Co. v. Peniston*, 85 U.S. 5, 35 (1873). See *United States v. Whitridge*, 231 U.S. 144 (1913) (excise tax impermissible); *Michigan v. Michigan Trust Co.*, 286 U.S. 334 (1932) (franchise tax permissible).

Sometimes the process of determining Congressional intent is clouded by uncertainty about whether Congress acted with reference to existing judicial constructions of the subject matter of the legislation under review. See *Midlantic Nat. Bank v. New Jersey D.E.P.*, 474 U.S. 494 (1986). No such concern is necessary with regard to § 960's enactment in 1934. Both the Senate and House reports explain that the Congress considered § 960 because of a federal district court opinion employing the judicially created tax-on-property/tax-on-operations di-

chotomy to limit state taxation of officials like federal receivers and bankruptcy trustees. In that case — *Howe v. Atlantic, Pacific & Gulf Oil Co.*, 4 F.Supp. 162 (W.D.Mo. 1933), *rev'd Kansas City v. Johnson,* 70 F.2d 360 (8th cir.), *cert. denied,* 293 U.S. 617 (1934) — the district court held that "a receiver operating a gasoline-and-oil distributing business was not liable for a sales tax on motor fuel levied by the State of Missouri." H.R. Rep. No. 1138, 73rd Cong., 2d Sess. (1934); S. Rep. No. 1372, 73rd Cong., 2d Sess. (1934). Relying on this Court's "differentiat[ion] between a franchise tax and an excise tax on doing business" in *Michigan v. Michigan Trust Co., Howe,* 4 F.Supp. at 164, the district court barred the collection of the sales tax since " 'the tax is imposed not upon the . . . property of the corporation, but upon the doing of corporate . . . business, and with respect to the carrying on thereof.' " *Id.* at 163.

This result struck Congress as an unjustified extension of the intergovernmental tax immunity doctrine:

> No good reason is perceived why a receiver should be permitted to operate [a business] under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue. S. Rep. No. 1372, *supra*; H. Rep. No. 1378, *supra.*

Congress remedied the *Howe* overextension of the intergovernmental tax immunity doctrine, while preserving that doctrine's protection of non-commercial trustee activity, by harmonizing the 28 U.S.C. § 960 standard for state taxation of trustees (conducting business with court approval) with the Bankruptcy Act's differentiation between effectuating a bankruptcy plan and running a business. The Bankruptcy Act of 1898, at § 48 (then 11 U.S.C. § 76), divided trustees' activities into two different

categories: (a) "Normal Administration" — trustee operations which accomplish the federal goals of liquidation or reorganization of the bankruptcy estate; and (b) "Conducting Business" — trustee operations which continue the business of the estate, as if still outside bankruptcy court, until the bankruptcy liquidation or reorganization can be effected. The business of bankrupts could be conducted by a trustee only if authorized by the bankruptcy judge "for limited purposes . . . if necessary in the best interests of the estate . . . " Bankruptcy Act of 1898, § 2(5), former 11 U.S.C. § 11. *See also* Bankruptcy Act of 1898 §§ 189, 343 and 445, former 11 U.S.C. §§ 589, 743 and 845.

In drafting the original version of § 960 in 1934, Congress tracked the second half of the Bankruptcy Act's "Normal Administration"/"Conducting Business" dichotomy, continuing the existing protection from taxation of trustee's liquidating activities. Congress did not simply state that when the trustee conducted business he could be taxed. It specifically limited his tax exposure to conduct of business *undertaken with court approval,* thereby carefully setting apart the protected zone of pure bankruptcy administration.[5]

---

[5]Section 960s applicability only to conduct of business with the approval of the court demonstrates the illogic of the Board's argument that this statute was intended to govern all bankruptcy liquidation sales. It plainly cannot. If a trustee never had occasion to seek permission to conduct the estate's business pending his preparation of the estate for liquidation, then when the liquidation sale finally occurs, § 960 will, by definition, be inapplicable. Congress certainly did not intend by § 960 to make *court approval* the determinant of tax liability. Instead, the reference to court approval serves to help clarify the type of activity — the conduct of business which requires court approval under Bankruptcy Act of 1898 § 2(5) — that the Congress intended to subject to state taxation.

Congress' decision to employ this bankruptcy law distinction allowed it to meet its goals for § 960 while leaving intact the tax immunity of liquidation and reorganization transactions central to the bankruptcy process. Congress saw "no good reason" to give a competitive advantage to trustees conducting a business. S. Rep. No. 1372, *supra* p. 12. Accordingly, § 960 levels the commercial playing field: a trustee who steps out of his ordinary bankruptcy role to act like a businessman should pay sales tax like any other businessman. However, the act of liquidating or reorganizing an estate has no anti-competitive effect, so its insulation from state taxation was continued. Additionally, a trustee liquidating or reorganizing an estate functions within the confines of the federal bankruptcy system and does not deprive the state of revenue it would otherwise receive.[6]

2. Congress Employed Distinctions Similar To That In § 960 For Similar Purposes In Other Legislation Concerning Bankruptcy.

In 28 U.S.C. § 959(a), originally enacted well before § 960, Congress used a formulation nearly identical to that of § 960 to express its intent on a related topic. In former 28 U.S.C. § 125 (now 28 U.S.C. § 959(a)) Congress: (i) allowed state court suits against receivers and trustees if based on trustee activity in the conduct of

---

[6]The contention of the Board and amicus National Governors' Association that a bankruptcy liquidation is indistinguishable from any other sale transaction ignores the unique characteristics — replicable by neither private party nor state government — of the federal bankruptcy process, which "includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the States were forbidden to do." *Hanover National Bank v. Moyses,* 186 U.S. at 181, 188.

business; and (ii) forbade, by the same omission of a grant of power as appears in 28 U.S.C. § 960, suits in state court based on any other trustee activity. In 1934, former U.S.C. § 125 provided:

> Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in *carrying on the business* connected with such property . . . (emphasis added).[7]

Two years before Congress considered § 960, Judge Learned Hand interpreted former § 125 to *bar* suits in state court related to a bankruptcy trustee's efforts to liquidate estate assets. *Vass v. Conron Bros. Co.,* 59 F.2d 969 (2d Cir. 1932). Judge Hand stated:

> To 'carry on the business' is, we should think, the same thing as to 'continue' it under section 2(5) of the Bankruptcy Act . . . It seems plain that this [the trustee's activity was not carrying on business as section 125 of title 28 uses that term; and that the liquidation of the lessees' resulting damages was as much a part of the usual administration in bankruptcy, as that of the pay of accountants, custodians or other assistants . . ." *Vass v. Conron Bros. Co.,* 59 F.2d at 971.

Judge Hand's analysis, and his reliance on the language of § 2(5) of the Bankruptcy Act, presages Congress' reasoning and intent when it enacted § 960 in 1934.

---

[7]Today, 28 U.S.C. § 959(a) provides:

> Trustees, receivers or managers of any property including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property.

By following the pattern of former § 125, as so recently interpreted, Congress clearly indicated its intent to define both what was, and was not, subject to state taxation.

3. The Principles of Legislative Interpretation Established by this Court Support The Conclusion That 28 U.S.C. § 960 Bars State Sales Tax on a Bankruptcy Liquidation Sale.

In today's legal environment, 50 years after *James v. Dravo,* Congressional expressions of intent to prohibit state taxation of a federal official tend to take a more explicit form than is found in 28 U.S.C. § 960. However, the contemporaneous legal terrain, the legislative history, and the comprehensive scheme for distributing the estate of a bankrupt set forth in the Bankruptcy Act all support the conclusion that when Congress took up the subject of state taxation of trustee activity in 1934 and enacted § 960, it intended to bar, by exclusion, state taxation of bankruptcy liquidation and reorganization activity.

In *First Agricultural Nat. Bank v. State Tax Commission,* 392 U.S. 339 (1968), the Court recognized the appropriateness of this approach to legislative interpretation when Congress' expression of an intention to limit the scope of state taxation is not stated in explicit terms. The issue, as here, was the imposition of state sales and use taxes. Congress had enacted a statute listing several types of taxes the states could impose on national banks. *Id.* at 342. Sales and use taxes were not listed, but neither were they excluded by name, just as in the case of sales tax on bankruptcy liquidation sales.

As here, the state argued that an express statement was required. However, the Court noted Congress' familiarity with judicial limitations on state taxation of national banks, *M'Culloch v. Maryland,* 4 Wheat 316 (1819) — just

as Congress was aware in 1934 of judicial restrictions, through the extension of *M'Culloch,* on state taxation of the activities of receivers and trustees. The Court concluded that under such circumstances Congress' enumeration of the specific taxes permitted constituted an expression of an intention to forbid all other taxes. *First Agricultural Nat. Bank v. Tax Commission,* 392 U.S. at 343-344.

The Court also based its decision to find a Congressional intent to exclude forms of taxation not explicitly enumerated on the fact that the statute in question " 'was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation . . .' " *Id.* at 344. The same considerations should govern state taxation of a bankruptcy liquidation sale. The Congressional expression of an intent to comprehensively control the subject of state taxation of the activities of trustees appears not just in one statute, here 28 U.S.C. § 960, but in the entire bankruptcy system.[8]

The Court has continued to apply this form of legislative interpretation when the subject matter of Congressional attention warrants it. Just three years ago, the Court ruled, in the context of the federal bankruptcy laws, that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Midlantic Nat. Bank v. New Jersey D.E.P.,* 474 U.S. 494, 501 (1986). In that case, the Court held that the 1978 amendment to 11 U.S.C. § 554(a), which seemingly gave the trustee complete authority to

---

[8]Congress' work in formulating the 1978 revision to the federal bankruptcy system has been described as "solving the competing policies in the tax and bankruptcy areas." 124 Cong. Rec. H. 11114-11115 (1978).

abandon property of the estate, should be read instead as codifying judicial limitations on the authority granted by the former statute. *Id.*

A primary area of disagreement between the majority and the dissent in *Midlantic* was the adequacy of the legislative history to support an inference that Congress was in fact acting with reference to the judicial exceptions. *Id.* at 509-510. The case now before the Court should pose no such cause for disagreement. As discussed above, the Congressional intent to act in direct reference to judicial treatment of the taxation of federal receivers and bankruptcy trustees is clear. S. Rep. No. 1372, *supra* p. 12; H. Rep. No. 1138, *supra* p. 12.

B. Congress Did Not Alter The Bar On The Imposition Of State Sales Tax On Bankruptcy Liquidation Sales When It Conducted A Complete Revision Of The Federal Bankruptcy Laws In 1978.

During 1977 and 1978 Congress conducted a complete revision of the federal bankruptcy system, ultimately adopting the Bankruptcy Code of 1978. According to S. Rep. No. 989 95th Cong., 2d Sess. 1 (1978), "The purpose of the [Bankruptcy Reform Act of 1978] is to modernize the bankruptcy law by codifying a new title 11 that will embody the substantive law of bankruptcy and to make extensive amendments to title 28, Judiciary and Judicial Procedure . . ."

During the more than 40 years since 28 U.S.C. § 960 was enacted, the prevailing judicial interpretation of that statute was that it forbade the imposition of state sales tax on a bankruptcy trustee based upon a bankruptcy liquidation sale. Although, as petitioner states, there was disagreement regarding the applicability of § 960 to use

taxes imposed on a purchaser in lieu of sales taxes on the vendor, see Section IIC, *infra*, there was also general agreement that, as the Ninth Circuit held in *Goggin I*, § 960 prevented the collection of sales tax on a liquidation sale from a bankruptcy trustee. *California State Board of Equalization v. Goggin*, 245 F.2d 44 (9th Cir.), *cert. denied* 353 U.S. 961 (1957); *California State Board of Equalization v. Goggin*, 191 F.2d 726 (9th Cir. 1951), *cert. denied* 342 U.S. 909 (1952); *State Board of Equalization v. Boteler*, 131 F.2d 386 (9th Cir. 1942); *In Re Leavy*, 85 F.2d 25 (2d Cir. 1936) (dicta); *In Re Hatfield Constr. Co.*, 361 F. Supp. 468 (M.D. Ga. 1973), *rev'd on other grounds*, 494 F.2d 1179 (5th Cir. 1974) (disagreeing with *Goggin II*); *In Re New York, New Haven and Hartford R.R. Co.*, 360 F. Supp. 1155 (D.Ct. 1973); *In Re Gene Adams Funeral Service, Inc.*, CCH Bk. L. Rep. No. 162, p. 33, ¶ 63, 455 (W.D. Okla. 1970); *In Re California Pea Products Inc.*, 37 F. Supp. 658 (S.D. Cal. 1941). *Contra*: *State of Missouri v. Gleick*, 135 F.2d 134 (8th Cir. 1943); *In Re Mid America Co.*, 31 F. Supp. 601 (S.D. Ill, 1939).

The *Goggin* principle was so well accepted by the time Congress began its consideration of a new Bankruptcy Code that leading commentators agreed a liquidating trustee is "not required to obtain a license from state sales tax authorities . . . nor is he required to pay a state sales tax imposed on retailers." 4A *Collier on Bankruptcy* ¶ 70.97[4]; *accord* Paskay, *Handbook for Trustees and Receivers in Bankruptcy* § 15.006[5] (1968); MacLachlan, *Bankruptcy* 349 (1956); Note, *Bankruptcy Sale As A Judicial Sale Free From Taxation*, 1 Journal of Public Law 504 (1952).

Thus the state of the law was extremely clear. If Congress had any concern that its intent in § 960 was being misinterpreted, it had ample opportunity during its

wholesale revision of the Bankruptcy Code to remedy the matter. This was not done. Amici's review of the legislative history of the 1978 Bankruptcy Code has disclosed no Congressional interest in disturbing the interpretation given § 960.

Congress' lack of action when conducting a comprehensive review of a body of law can be as telling of its intent as is the actual language of a statute. As the Court recently ruled in interpreting another provision of the Bankruptcy Code enacted during the 1978 revision, when Congress re-enacts, without alteration, a statute which has been subject to established judicial treatment, it intends the statute to be interpreted in light of that treatment. *Kelly v. Robinson*, 479 U.S. 36, 46-47 (1986). Congress' lack of action regarding the imposition of state sales tax on bankruptcy trustees is equally telling of its intent to maintain the law as it has been since the passage of § 960.

C. The Imposition Of A Use Tax, In Lieu Of Collecting Sales Tax From The Bankruptcy Trustee, Contravenes Congress' Intent That Bankruptcy Liquidation Sales Be Free Of State Taxation.

The one issue before the Court calling for some extrapolation from Congress' expressions of intent is whether 28 U.S.C. § 960's prohibition on the assessment of sales tax on the vendor at a bankruptcy liquidation sale can be circumvented through the assessment instead of use tax on the purchaser. This was the final issue addressed by the Ninth Circuit in its *Goggin II* decision. The Sierra Summit situation now before the Court presents a special wrinkle, through the Board's attempt to collect the substitute use tax not from the purchaser at the liquidation sale but from later renters of the goods purchased.

For purposes of extending Congress' underlying intent into this situation, there is no meaningful difference between a sales tax imposed on the vendor and a use tax imposed on the purchaser. As the Board explains, the "California 'use tax' tax in question herein is . . . imposed at the same rate as the sales tax . . . upon property for which no California sales tax was paid . . . *The use tax is a compensating complement to the California sales tax.*" Petitioner's Brief, page 20 (emphasis added). California's purpose is to collect a tax on property when it changes hands. For California, the sales and use taxes are simply two sides of the same revenue-generating coin.

There is no difference in the economic impact on a bankruptcy liquidation transaction between collecting sales tax from the vendor and collecting use tax from the purchaser. Market forces set the price that will be paid for the goods or business being offered. Once it is known that a use tax will be imposed as a substitute for a sales tax, the market will adjust the price to compensate for this tax. In the liquidation sale setting, whether the seller pays a sales tax or the purchaser pays a use tax, the total proceeds to the estate will be equally diminished.

Congress has chosen through § 960 to bar the collection of sales tax on bankruptcy liquidation transactions. The evasion of that expression of Congressional purpose through a use tax, legally and economically indistinguishable from the sales tax, should not be allowed. The cases relied upon by petitioner for its argument concerning the decline of the intergovernmental tax immunity doctrine base their analyses on the rejection of meaningless legal formalisms as a basis for judicial construction of legislative enactments. For example, in *United States v. New Mexico,* 455 U.S. 720, 738, n. 12 (1982) the Court rejected an argument that a state's ability to tax a government

contractor should turn on whether the state tax was a " 'privilege-type use tax' ", a " 'compensating use tax' ", or a "sales tax". Similarly, in *Detroit v. Murray Corp.*, 355 U.S. 489, 493 (1958), the Court brushed aside as "empty formalisms" distinctions between the descriptions given by states to taxes serving the same function.

The same result should apply in consideration of the Ninth Circuit's determination in *Goggin II* that the collection of a use tax from the purchaser at a liquidation sale is forbidden by § 960 because "the tax is in fact based on the sale." *Goggin*, 245 F.2d at 46. To rule otherwise would ignore the economic realities attendant to bankruptcy liquidation sales and be "the victory for empty formalisms" that the Court decried in *Detroit v. Murray Corp.*, at 355 U.S. at 494.

III.

ANY DECISION TO REVERSE THE *GOGGIN* RULE SHOULD APPLY ONLY PROSPECTIVELY.

Finally, even if this Court reaches the issues presented in the *Goggin* decisions and determines that liquidation sales are subject to state sales and use tax, such a decision should be applied only prospectively, and should not apply to transactions which took place under plans approved by bankruptcy courts prior to the issuance of the Court's opinion.

Amici urge the Court to address the prospectivity question in the instant case, rather than waiting for the issue to arise subsequently. Recently, this Court increasingly has been called upon to address questions concerning the retroactive effect of its decisions where, as would be the case here, those decisions overrule or alter long-standing precedent. Most often, these questions must be

raised by the inefficient process of a separate petition for certiorari and oral argument. *See e.g., Shea v. Louisiana,* 470 U.S. 51 (1985); *Solem v. Stumes,* 465 U.S. 638 (1984); *United States v. Johnson,* 457 U.S. 537 (1982). Two such cases are presently before the Court regarding the retroactive effect of the Court's decision in *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266 (1987). *See American Trucking Associations, Inc. v. Smith,* No. 88-325, and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco,* No. 88-192.

It would seem far more sensible, and efficient, for the Court to address prospectivity questions in the law-changing decision itself, since such issues often can be anticipated. Generally, the issues with respect to prospectivity are fairly well-defined and further briefing and argument is not necessary. Indeed, on one recent occasion this Court addressed the prospective effect of its decision in the decision itself, thereby alleviating at least some of the anticipated turmoil in the lower federal bankruptcy courts. *See Northern Pipeline Construction Co v. Marathon Pipeline Co.,* 458 U.S. 50, 87-88 (1982).

A. This Court Has Recognized That Decisions Which Set Forth New Rules Of Law Should Not Apply Retroactively If Such Application Would Upset The Justifiable Reliance Of Those Who Acted Under The Old Rule.

This case presents a classic example of a rule of law which, if disturbed, should be disturbed only prospectively. In *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), this Court set forth the comprehensive test for determining whether to apply a new rule retroactively or prospectively in federal civil cases. While the *Chevron* Court recognized the general rule that judicial decisions in the

civil context should apply retroactively, the Court also delineated a class of cases — those where a new rule of law has been announced, and where retroactive application of that new rule would vitiate the actions of those who justifiably relied on the old rule — where courts *should* apply their decision only prospectively.

The *Chevron* Court identified three factors which must be considered: first, the decision to be applied non-retroactively "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . , or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; second, the Court "must . . . weight the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operations would further or retard its operation"; and third, the Court must "weigh the inequity imposed by retroactive application . . . " *Chevron*, 404 U.S. at 106-107.

B. Application Of The Chevron Test Demonstrates That Any Break With The *Goggin* Decisions Should Apply Only Prospectively.

If this Court determines that the *Goggin* decisions were incorrectly decided, the *Chevron* test demonstrates that that decision must be applied prospectively. A decision by this Court that a state may apply a sales or use tax to a bankruptcy liquidation sale would constitute a break with "clear past precedent on which litigants may have relied." *Chevron*, 404 U.S. at 106. Often called the "reliance" factor, this factor measures the extent to which an actor could justifiably rely on the precedent which was being altered or overruled. *See Confusion in Federal Courts: Application of the Chevron Test In Retroactive-Prospective Decisions*, 33 Ill. L. Rev. 117, 129 (1985); *Cf. Solem v. Stumes*, 465 U.S. at 645-650 (discussing "reliance factor" in retroactivity analysis in the criminal context).

In this case the potential for justifiable reliance is patent. The *Goggin* rule has been the law of the Ninth Circuit for over 30 years. Despite a split in the Circuits, which was acknowledged in the *Goggin II* opinion, this Court denied certiorari from both *Goggin* decisions, and has subsequently denied certiorari in other cases presenting this issue, as recently as 1985. *See In Re Cusato Bros. International, Inc.*, 750 F.2d 887 (11th Cir.), *cert. denied*, 472 U.S. 1010 (1985). Moreover, Congress has not seen fit to address this question despite its recent revision of the Federal Bankruptcy Code, in which it addressed other minutia concerning state and local taxation of bankrupt estates.

In addition, the State of Californa has issued Sales Tax Counsel Rulings which, consistent with the *Goggin* rule, confirmed that the Board of Equalization would not apply sales or use tax to court-approved liquidation sales. *See* Sales Tax Counsel Rulings 198.0020 (1983) and 198.0080 (1957), 2 CCH Calif. State Tax Rptr. ¶ 60-165.71.[9] Under these circumstances, a bankruptcy trustee or liquidator, or the creditors of a bankrupt estate, can hardly be blamed for structuring their affairs on the assumption that, at least in those states encompassed within the

---

[9]California Sales Tax Counsel Ruling 198.0020 states: "**Sale by Debtor in Possession.** Tax does not apply to court approved liquidation sales by debtors under either Chapter 7 or 11 of the Bankruptcy Code. 7/25/83."

California Sales Tax Counsel Ruling 198.0080 states: "**Trustee in Bankruptcy**". The use tax does not apply with respect to property purchased at a liquidation sale from a trustee in bankruptcy acting under a Federal court order. 7/10/57."

Ninth Circuit, there could be no sales or use tax on a liquidation sale.

The second *Chevron* factor requires examination of the purposes of the rule in question, and " 'whether retrospective operation will further or retard [the] operation' " of the rule. *Marathon*, 458 U.S. at 88 (citing *Chevron*, 404 U.S. at 107). In the present case retrospective operation would not further the operation of the rule; it would simply permit the Board to collect taxes on past transactions, which it had assured taxpayers were not subject to tax. *See* Sales Tax Counsel Rulings 198.0020 and 198.0080, *supra* n.9. Furthermore, it would purport to speak for Congress with respect to past transactions when Congress has clearly been content to leave the *Goggin* rule in effect for over 30 years.

Finally, *Chevron* directs the Court to consider whether retroactive application "could produce substantial inequitable results." 404 U.S. at 107. The potential inequities here all fall on those who have relied on the *Goggin* rule. First, a retroactive overturning of *Goggin* would dramatically affect bankruptcy plans which have been structured with the *Goggin* decisions in mind. Sales pursuant to those plans might have been structured differently or the plans themselves might have been revised had the parties been aware of the possibility of a sales or use tax on their transactions.

Second, no inequities will accrue to the state if a decision overruling the *Goggin* rule is applied only prospectively. Given the thirty years that *Goggin I and II* have governed liquidation sales in the Ninth Circuit, and given the Board's Sales Tax Counsel Rulings, California can hardly have structured its revenue plans on the assumption that the sales tax applies to liquidation sales. Retroactive application of a decision overruling the

Goggin rule thus will upset the settled expectations *which the state itself has sought to foster.* This is precisely the type of inequity and reliance which the *Chevron* Court was referring to when it penned the first and third factors of the retroactivity/prospectivity test.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

DANIEL M. GLOSBAND
ANTHONY M. FEEHERRY
JOHN C. ENGLANDER
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, Massachusetts
(617) 549-1000

FREDERICK A. RICHMAN
M. RANDALL OPPENHEIMER
ALAN RADER*
O'MELVENY & MYERS
1800 Century Park East
Suite 600
Los Angeles, CA 90067
(213) 553-6700

Attorneys for Amici Curiae

**Counsel of Record*

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, CA 90015.

On March 3, 1989, I served the within Brief of the First National Bank of Boston and Security Pacific National Bank as Amici Curiae In Support of Respondent, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

John K. Van De Kamp
Robert F. Tyler
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California 94244-2550

David Ray Jenkins
Lang, Richert & Patch
2307 North Fine
P.O. Box 55555
Fresno, California 93747

All Parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 1989, at Los Angeles, California

J. Gordon Hooper

J. GORDON HOOPER